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**WISCONSIN COURT OF APPEALS
DISTRICT I**

Appeal No. 2011-AP-001769

ROBERT L. HABUSH and
DANIEL A. ROTTIER,

Plaintiffs-Appellants,

vs.

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

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS

**Appeal From a Final Judgment of the Circuit Court for
Milwaukee County Case No. 09CV018149
The Honorable Charles F. Kahn, Presiding**

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INTRODUCTION

“It is the intent of the legislature
to make competition
the fundamental economic policy of this state.”¹

As powerful as these bare words are, standing alone they are insufficient to explain how they singularly dispose of the claims asserted by the two lawyers in this case, plaintiffs-appellants, Robert L. Habush and Daniel A. Rottier.

Competition in economics involves individuals and firms striving **for a greater share** of a market to buy or sell goods and services. As the principal shareholders of a virtually ubiquitous Wisconsin law firm, plaintiffs have sought not just diversion of potential clients to their law firm, but have sought (and claim to have achieved) “dominance” in all their geographic markets² by using virtually every marketing medium to do so: print, Yellow Pages, television, radio, and the Internet.

They are not just free to do that; it is their right. That freedom and right is integral to the concept of competition and is the freedom to attempt to

¹ [Eichenseer v. Madison-Dane County Tavern League, Inc.](#), 2008 WI 38, ¶33, 308 Wis.2d 684, 748 N.W.2d 154. Emphasis added.

² In a testimonial for HHR’s search engine optimization firm, plaintiff Habush stated: “We have trusted The Search Engine Guys with our web marketing for the past 3 years. They have delivered strong first page placements, **we are dominant in all 13 of our local markets....**” (R.94:89)(Emphasis added).

divert potential customers of other competitors. But, those competitive rights don't just apply to these two lawyers but to all lawyers. Permitting lawyers to advertise was a recognition that the economic benefits of competition and comparison benefit the consumers of legal services. Significantly, as the *sole* regulator of lawyers and lawyer advertising, the Wisconsin Supreme Court has established no regulation barring the use of sponsored links by law firms.

The freedom to seek comparison and diversion of potential clients is a right of every lawyer and law firm in Wisconsin. Competition is “the fundamental economic policy of this state.” See *supra* note 1. Under the guise of an invasion of privacy claim under Wis. Stat. §995.50, plaintiffs seek a monopoly on the “right” of diversion of potential clients by denying the rights of competition, comparison and diversion to other lawyers.

Competition by location—whether it be service stations, convenience stores, fast food restaurants, or car dealers at the same intersection, or by ad placement in Yellow Pages—has been a basic staple of competition for ages. The Internet's equivalent of this is the keyword-driven sponsored links at issue here. There is nothing unreasonable about the technology and use of sponsored links. Not only do search engines like Google automatically display similar links through the “pages similar” and “pages different” offerings, but plaintiffs themselves have engaged in similar technology:

1. Plaintiffs caused an ad for HHR to “pop up” whenever another Wisconsin lawyer’s name was entered as a search term in Yellowpages.com and companion search engines.
2. To this day, plaintiffs have a “spam blog” where they “use” the names of accident victims and attorneys in reprinting or rephrasing news stories to drive up web traffic and their Google score from viewers of those news stories.

This lawsuit is an attempt by plaintiffs to use §995.50 to stifle fundamental economic competition by one of its competitors. The circuit court properly determined that defendants’ Internet marketing practice was reasonable as a matter of law and granted summary judgment to defendants, dismissing plaintiffs’ case in its entirety.

STATEMENT OF ISSUES

1. Does an Internet marketing campaign, whereby defendants bid on keywords “habush” and “rottier” to produce a sponsored link to Cannon & Dunphy, S.C.’s website, constitute an invasion of the privacy rights of Robert L. Habush and Daniel A. Rottier under Wis. Stat. §995.50(1)?

Answered by the Circuit Court: No.

2. Under §995.50(2)(b)’s definition of the right of publicity, does defendants’ bidding on keywords “habush” and “rottier” constitute the use of a living person’s name for purposes of advertising and trade without consent?

Answered by the Circuit Court: Yes.

**STATEMENT REGARDING ORAL ARGUMENT AND
PUBLICATION**

Defendants welcome oral argument to address the issues presented on this appeal. Because this case raises issues of first impression in Wisconsin, publication is warranted. Wis. Stat. §809.23(1)(a)(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. The Parties.

Plaintiffs-appellants Robert L. Habush and Daniel A. Rottier are shareholders who consented to the use of their surnames in the law firm of Habush, Habush & Rottier, S.C. (HHR)(R.133:1) HHR currently has thirteen offices statewide and over forty attorneys.³ Plaintiffs have strived for and established a “dominant” presence in the personal injury market in this State. (R.94:89)(R-App.318) HHR has achieved that dominance through a strategy of aggressive multimedia marketing campaigns where the plaintiffs surnames, as part of HHR, are used to the point of saturation and ubiquity in this State.

Defendants-respondents, William M. Cannon and Patrick O. Dunphy are named shareholders in the Cannon & Dunphy, S.C. law firm, which has one office in Brookfield with nine lawyers.⁴ (R.133:1-2) Defendants have

³ <http://www.habush.com/> and <http://www.habush.com/attorneys/>.

⁴ <http://www.cannon-dunphy.com/> and <http://www.cannon-dunphy.com/Attorneys/>.

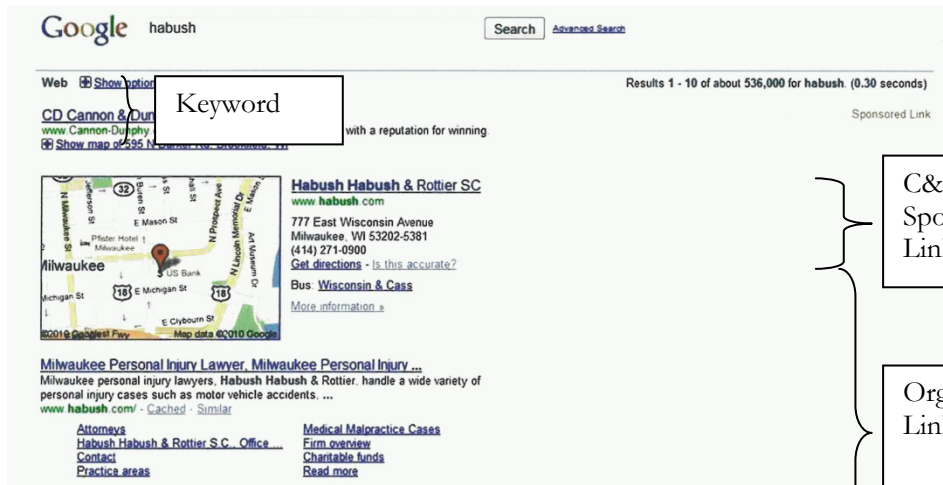
established a strong presence in the personal injury market by their track record, which includes eleven cases with paid settlements or verdicts exceeding \$10 million. (R.110; Exh.2)

B. Internet Marketing Programs And Keywords.

Both plaintiffs and defendants participate in Google's AdWords and Yahoo!'s Search marketing programs, which utilize a bidding process on chosen keywords to produce the appearance of a "sponsored link" to their law firm websites. (R.93:94-95) Since 2006, plaintiffs have participated in such marketing, bidding on keywords such as "personal injury attorney," "accident attorney," and "malpractice attorney." (Id.)

Starting in 2009, defendants started such marketing on Google, Yahoo! and Bing and included "habush" and "rottier" as competitive keywords that are bid upon to obtain space for the display of a sponsored link to their website. (R.98:11; Rpt.p.8)(R-App.111)(R.93:220-21)(R.133:2) Defendants began their campaign after noticing other attorneys were displaying their law firm sponsored links by bidding on "cannon" or "dunphy" keywords. (R.93:21; Exh.2 at pp.39-41)

The purpose of defendants' sponsored link is to "obtain a billboard location to give consumers knowledge, information, facts, and choices about legal services." (R.93:15;Exh.2 p.14) It appeared as follows:



(R.133:3)

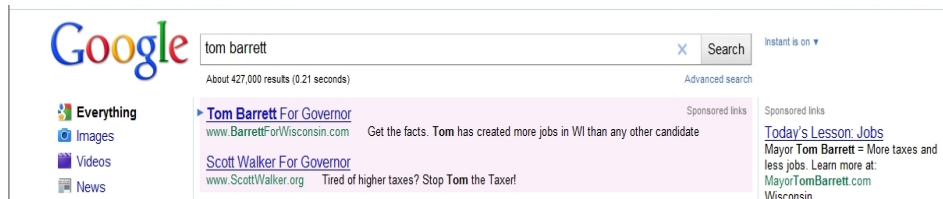
Neither defendants’ sponsored link nor their website contains any reference to “habush,” “rottier,” plaintiffs, or HHR. (R.98:11; Rpt. p.8)(R-App.111)(R.133:23) There is nothing on defendants’ sponsored link or their website indicating that plaintiffs endorse them. (R.133:23) Defendants’ sponsored link does not affect HHR’s sponsored or organic links or prevent their appearance. (R.93:157; Exh.12 p.158)(R.93:77-78; Exh.3 pp.45-46)

C. Sponsored Links and Competitive Keywords.

Sponsored or “paid” links are set off from the organic search results in a colored box at the top or side of the screen and are marked “sponsored link,” “sponsored result,” or “sponsored site.” (R.93:157; Exh.7 p.72) (R.94:3,76-85; Exhs.4A-D)(R-App,304-14)(R.98:11; Rpt.p.8)(R-App.111)(R.1 at Exhs.A-C)(R.133:2) Once the identified types of results—organic and

sponsored—are displayed, the searcher has the choice to click on, or not click on, any of the links. (R.98:5; Rpt. at p.2)(R-App.105)

Competitive keyword bidding is “fairly widespread across the United States.” (R.93:145; Exh.7 at p.24) Not only have lawyers in Wisconsin and other states bid on competitive keywords, but candidates in the 2010 elections in Wisconsin utilized competitive keyword marketing to communicate their messages and websites to the public. (R.99:8; Exh.1 p.5)(R-App.213) The following screen shot shows that the Walker campaign bid on “tom barrett”—a full name (not just a surname)—as a keyword to enable the “Scott Walker for Governor” sponsored link to appear whenever “tom barrett” was “googled.” (R.94:80)(R-App.309)



D. There Is No Evidence Of Confusion Or Deception Of The Public.

There is not a shred of evidence that any client or potential client was confused or deceived by defendants’ sponsored link, or that HHR lost any potential or actual clients as a result. Plaintiff Habush acknowledged that he had no evidence of any clients who were lost or diverted due to defendants’ sponsored link:

Q. Do you have any evidence of having lost any client who specifically wanted to get to you and hire you because of the sponsored link?

A. I have not.

....

...We have no proof that we've ever lost a client to them....

(R.93:86-87; Exh.4 at pp.39-40)(R.93:104; Exh.4 at p.133) Plaintiff Rottier also acknowledged this, as did another HHR partner, Laurence Fehring. (R.93:114-15; Exh.5 at pp.100,109)(R.93:255; Exh.11 at p.29); see (R.93:99-100; Exh.4 pp.79-80)(R.93:55; Exh.2 pp.174-76)

II. PROCEDURAL HISTORY.

Prior to commencing this litigation, plaintiffs sent another small personal injury law firm a “cease and desist” letter, demanding it stop using keywords coinciding with portions of the HHR firm name and requiring immediate confirmation that it had stopped its marketing. (R.4) Defendants did not receive such a letter or even a telephone call. Instead, plaintiffs sued defendants, alleging a sole cause of action under Wis. Stat. §995.50, seeking injunctive relief and attorney’s fees. (R.1) HHR made the lawsuit the subject of an immediate press release, which publicly characterized the defendants’ actions as “illegal” and “unlawful.” (R.11:6)

Early on, the circuit court granted defendants' motion to dismiss the claims of HHR because §995.50(2)(b) only applies to "living person[s]."⁵ (R.146:60)(R.64) Following discovery, the remaining plaintiffs and defendants both moved for summary judgment. (R.91)(R.105) The parties stipulated that the circuit court could make all factual findings and conclusions of law "to render judgment without a trial." (R.130)

By decision dated June 30, 2011, Judge Charles F. Kahn denied plaintiffs' motion, granted summary judgment to defendants and dismissed the case. (R.133:27) While Judge Kahn found the technical definition of an invasion of the right of publicity in §995.50(2)(b) was met, the other critical element for an actionable claim—that the invasion be unreasonable—was not satisfied. Judge Kahn held that keyword marketing on the Internet is the modern version of "location competition." (R.133:19) His well-reasoned analysis provides in part:

In ancient times, people used paper telephone directories. A user could find a particular attorney by viewing the alphabetical listings while carefully avoiding the block ads preceding and to either side of the name being searched. The plaintiffs themselves sought the attention of everyone seeking anything in the directory by placing a full page ad on the back cover of the telephone book. Within the attorney listings in the directory, the very first result returned to a searcher is a double-page ad for whichever firm paid substantial sums to obtain that placement....[C]ompetition has historically allowed attorneys and firms to obtain a priority position through payment of a premium.

⁵ If there is some right associated with the words "habush" and "rottier," it would seem to reside in that corporate entity and would not have protection under a statute applying to "living persons."

Television and radio advertising is useful as a shotgun approach to inform the public of the availability of one's offered services. A more targeted approach, however, is to be at the very place a motivated purchaser would be when that purchaser is shopping for such services. It used to be the telephone directory. Now that place is the Internet

.... Defendants are correct that this tends to put businesses in the relative positions on the Internet that they were once in when clients used telephone directories.

Defendants could write to TV stations that carry ads for Habush Habush & Rottier, S.C. They could ask to purchase ad-time within 20 minutes of every ad run by the Habush firm. If the defendants did this, they would be using the name of plaintiffs for purposes of advertising without the plaintiffs' consent. But such use is consistent with the principles of energetic business competition in our state and is not unreasonable.

(R.133:19-20) Judge Kahn held that “plaintiffs cannot show that defendants unreasonably violated their privacy.” (R.133:1) Judgment was entered for defendants. (R.140) Plaintiffs appealed.

STANDARD OF REVIEW

The “standard of review for summary judgment is well known.” [Smerz v. Delafield Town Bd.](#), 2001 WI App 41, ¶5, 332 Wis.2d 189, 796 N.W.2d 852. Even though this Court's review of the summary judgment and the interpretation and application of a statute is de novo, it “may benefit from the trial court's careful analysis.” [Samuels Recycling Co. v. CNA Ins. Cos.](#), 223 Wis.2d 233, 243, 588 N.W.2d 385 (Ct. App. 1998); see [Heier's Trucking, Inc. v. Waupaca County](#), 212 Wis.2d 593, 598, 569 N.W.2d 354 (Ct. App. 1997). Moreover, where, as here, the legal determination of “reasonableness is so closely intertwined with the facts supporting that ruling,” **an appellate court**

“must give some deference” to the circuit court’s ruling on reasonableness. [Pollack v. Calimag](#), 157 Wis.2d 222, 240, 458 N.W.2d 591 (Ct. App. 1990)(Emphasis added); [Village of Williams Bay v. Schiessle](#), 138 Wis.2d 83, 88, 405 N.W.2d 695 (Ct. App. 1987)(same).

The final day-long hearing before Judge Kahn became the functional equivalent of a trial to the court and not just the usual summary judgment motion hearing. Affidavits and depositions of experts and other witnesses were offered in lieu of live testimony. The parties built a substantial factual record. No evidence was refused consideration by Judge Kahn.

ARGUMENT

I. **THERE IS NO INVASION OF PRIVACY BECAUSE BIDDING ON KEYWORDS TO PRODUCE A SPONSORED LINK TO A WEBSITE IS REASONABLE AS A MATTER OF LAW.**

A. **Section 995.50(1) Requires An Invasion Of Privacy To Be Unreasonable.**

In Wisconsin, an invasion of privacy is not actionable unless it is unreasonable. Wis. Stat. §995.50(1). The express language of §995.50(1) provides relief only to “[o]ne whose privacy is unreasonably invaded.” See [Hagen v. Dahmer](#), 38 U.S.P.Q.2d 1146, 1995 WL 822644 at *4, n.4 (E.D. Wis. 1995)(setting forth statute’s requirement of an unreasonable invasion). Subsection (2)(b) of §995.50 is simply one of the definitions of an “invasion of privacy.” [Hagen](#), at *4 ((2)(b) is the “right of publicity.”).

The statutory requirement that the invasion of privacy be unreasonable is clear and unambiguous and must be interpreted according to its terms’ plain meaning. See [Thomas v. Iowa Nat’l Mut. Ins. Co.](#), 132 Wis.2d 18, 22, 390 N.W.2d 572 (Ct. App. 1986). This Court “cannot ignore the plain language of the statute.” [S.C. Johnson & Son, Inc. v. Wisconsin Dept. of Revenue](#), 202 Wis.2d 714, 723, 552 N.W.2d 102 (Ct. App. 1996).

Plaintiffs nevertheless ask this Court to do just that. Plaintiffs seek to convert §995.50 into a strict liability statute that makes *any* invasion of the

right of publicity under (2)(b) actionable, regardless of its reasonableness.

(Brf. at 17) The circuit court properly rejected this request:

[E]ntitlement to the relief is for one whose privacy is unreasonably invaded....a person's privacy is invaded if there is a violation of 2b; and in paragraph 1 what is required is that **in order to have the entitlement of relief what's required is the unreasonable invasion of privacy.**

Therefore, my legal determination is that in addition to establishing the invasion of privacy under paragraph 2b, **the party seeking the relief must also establish that the invasion of privacy was unreasonable.**

(R.146:75)(Emphasis added).

Plaintiffs assert the word “unreasonably” should be disregarded because subsection (1) is a mere preamble, “meant to merely introduce and describe the four types of privacy invasions...that are in and of themselves unreasonable....” (Brf. at 16) Plaintiffs’ narrow focus on (2)(b) to the exclusion of the balance of the statute contravenes Wisconsin precedent governing privacy rights:

judicial decisions and legislative enactments have widely recognized the right of an individual to be free from **unreasonable interference by others in matters of which they are not concerned.**

[Zinda v. Louisiana Pacific Corp.](#), 149 Wis.2d 913, 928, 440 N.W.2d 548 (1989)(Emphasis added). Plaintiffs’ position also violates no less than three rules of statutory construction.

First, plaintiffs’ interpretation contravenes the express language of §995.50(1), and is, therefore, itself unreasonable. See [Trott v. DHFS](#), 2001 WI App 68, ¶14, 242 Wis.2d 397, 409, 626 N.W.2d 48 (“interpretation is

unreasonable if it directly contravenes the language of the statute.”) see [CCS North Henry v. Tully](#), 2001 WI App 8, 240 Wis.2d 534, 546, 624 N.W.2d 847 (“the language chosen by the legislature” must be applied “to the facts of the case.”)

Second, “one subsection of a statute which has multiple subsections that deal with the same topic,” is not read “in isolation from the rest of the statute.” Id. Subsection (1) must be read in conjunction with (2) of §995.50, meaning that a plaintiff is entitled to relief only if the right of publicity is unreasonably invaded. Subsection (3) must also be considered. It mandates that “[t]he right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy.” Even at common law, a violation of the right of privacy/publicity had to be unreasonable for the plaintiff to recover. See [Martin v. Senators, Inc.](#), 418 S.W.2d 660, 664 (Tenn. 1967)(affirming dismissal of plaintiff’s common law action for invasion of privacy/publicity for use of photograph because it “could not be characterized” “as unreasonable” as a matter of law).

Third, plaintiffs resort to “extrinsic aids” for their tortured interpretation of §995.50—asserting the phrase “unreasonably invaded” is ambiguous—is not warranted. Statutory language is ambiguous only when “it is capable of being reasonably understood in two or more different ways.”

[Gross v. Woodman's Food Market, Inc.](#), 2002 WI App 295, ¶42, 259 Wis.2d 181, 655 N.W.2d 718. “One whose privacy is unreasonably invaded is entitled to relief” means precisely that. Plaintiffs’ disagreement with the application of this basic language does not make the statute ambiguous.

Plaintiffs’ reliance on the New York statute (Brf. at 22-23) does not help either because it does not contain an “unreasonable” element, whereas §995.50(1) does.⁶ While subsection (2)(b) of §995.50 was taken “almost verbatim” from the New York Civil Rights Law §50 (McKinney 1976), subsection (1) and subsections (2)(a), (c) and (d) of §995.50 were **not** adopted from the New York law. See Judith Endejan, “The Tort of Misappropriation of Name or Likeness Under Wisconsin’s New Privacy Law,” 1978 Wis. Law Rev. 1029, 1033, 1034 at n.27 & 30 (summarizing the statute’s legislative history).

Plaintiffs miscite the Endejan article, claiming the common law supports the view that “unreasonably invaded” is not a separate element for an invasion of privacy claim. (Brf. at 23) The article specifically states:

The growth of a separate tort for the invasion of privacy was furthered by the American Law Institute in section 867 of the *Restatement of Torts* of 1938 ^[fn]

⁶ Plaintiffs reliance on [Klein v. Proporzia P.S.C. Ltd.](#), C.A. 48511-07 (Tel Aviv-Jaffa Magistrate Court)(Brf. at 42-43) is similarly misplaced because there is no indication that the Israeli privacy statute had an unreasonableness requirement.

^[fn] The *Restatement of Torts* provided: “A person who **unreasonably and seriously interferes with another’s interest in not having** his affairs known to others or his **likeness exhibited to the public is liable to the other.**”

Id. at 1034-35 & n.33 (Emphasis added).

In cases interpreting privacy statutes like Wisconsin’s that contain an “unreasonableness element,” summary judgment is properly granted when defendants’ acts are reasonable as a matter of law. See [Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.](#), 567 N.E.2d 912, 913, 916 (Mass. 1991)(judgment for defendant because acts were done for a legitimate business purpose and did not constitute an unreasonable invasion of privacy as a matter of law); [Folmsbee v. Tech Tool Grinding & Supply, Inc.](#), 630 N.E.2d 586, 589, 590-91 (Mass. 1994)(affirming summary judgment for defendants because no unreasonable interference with plaintiffs’ statutory privacy rights as a matter of law). So it is here.

B. Bidding On Keywords To Produce A Sponsored Link To A Website Is “Reasonable” As A Matter Of Law.

The reasonableness analysis in this case must be done against the backdrop of legitimate competition and the recognition that it is permissible to fairly divert potential business from one’s competitors. As Judge Kahn noted at the outset:

[T]he “fundamental economic policy of this state” is “competition.” Wis. Stat. §133.01. “The freedom to compete implies a right to induce prospective customers to do business with the actor rather than with the actor’s competitors. [A seller is permitted] to seek to divert

business not only from competitors generally, but also from a particular competitor.”....

Any analysis of the question of reasonableness must take into account th[is] fundamental policy....

(R.133:18)(Emphasis added). Case law is in accord. In [New Kids on the Block v. News America Publishing, Inc.](#), 971 F.2d 302, 310 (9th Cir. 1992), the court captured the essence of this free market concept:

[Plaintiffs] . . . ignore the maxim that all's fair in love, war and the free market. Plaintiffs' case rests on the assumption that the polls operated to siphon off the [Plaintiffs'] fans or divert their resources away from “official” New Kids products. Even were we to accept this premise, no tort claim has been made out: “So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means.... In short, it is no tort to beat a business rival to prospective customers. (Emphasis added).

Ignoring these concepts wholesale, plaintiffs instead repeat the mantra that defendants' keyword campaign is “exploitive” and therefore unreasonable. Restating this conclusion ad nauseam does not make it true. See [State v. Bohacheff](#), 114 Wis.2d 402, 411 n.9, 338 N.W.2d 466 (1983)(“Saying it's so doesn't make it so.”). Nevertheless, plaintiffs' brief contains almost thirty references to “exploit,” “exploitive,” “exploiting,” or “exploitation,” (Brf. at 2,5,6,23,26,27,36,37,39,40,43,44,46,48,50,52,55,60,64, 65,66) as well as other inflammatory words, including “hijack,” “capitalizing,” “illegal,” “immoral,” and “free-riding.” (Brf. at 5,6,7,29,41,48) These assertions are bereft of even a thread of evidentiary or legal support.

After cutting through this hyperbole, a reasoned analysis of what the circuit court described as “the historic, technological and historic cultural factors” involving comparative marketing (R.133:26) demonstrates that bidding on competitor keyword to produce a competitor’s sponsored link is reasonable for the following reasons.

1. Bidding on Keyword Search Terms is an Auction for Space Near a Competitor’s Result.

Defense expert Thomas O. Johnston, a Certified Google AdWords Professional and Account Manager at Aloha Interactive Marketing, opined that bidding on “competitor keywords is a reasonable way to provide information” because:

The bidding for keyword search terms is essentially an auction for space....The purchase of sponsored links is not the purchase of an individual or a company’s name but is buying the opportunity to participate in an auction for space near a competitor’s result.

It is always the user or searcher who chooses which search terms he or she wants to use. When the publisher provides the opportunity to auction space via keyword searching, the user/consumer benefits by obtaining a greater array of choices that fit or may fit his or her search needs.

(R.98:10-11; Rpt.pp.7-8)(R-App.110-11) Former State Bar President Gary Bakke also aptly noted: “Section 995.50...cannot be rationally applied, to the *location or placement* of an advertisement as opposed to the *content* of that ad.”

(R.98:9; Rpt.p.6)(R-App.109)

In dismissing a trademark claim against Google arising out of its Google AdWords Program, the court in [Rosetta Stone Ltd. v. Google, Inc.](#),

730 F.Supp.2d 531 (E.D. Va. 2010), noted that with keyword-driven sponsored links, Google was “selling space on a search page” coinciding with what “online shoppers” were looking for:

Here, Google uses trademarked keywords, including the Rosetta Stone Marks, to identify relevant Sponsored Links....**The keywords, therefore, have an essential indexing function because they enable Google to readily identify in its databases relevant information in response to a web user’s query.... advertisers rely on the keywords to place their products and services before interested consumers....In terms of encouraging competition, the keywords also serve an advertising function that benefits consumers who expend the time and energy to locate particular information, goods, or services, and to compare prices.** Google’s search engine provides consumers with a highly useful means of searching the internet for products and competitive prices...

Id. at 546. (Emphasis added). The court went on to note that Google is in the business of

selling space on a search page which happens to be a prime location for advertisers wishing to display their advertisements to online shoppers. This is no different than building owners in New York’s Time Square who sell space for Billboards. Given Times Square’s high pedestrian and vehicular traffic, billboards located there offer advertisers great visibility, just as Google’s popular search engine offers third party advertisers a great opportunity to display their advertisements for goods and services.

Id. at 449-50. (Emphasis added).

2. Competitive Keyword Bidding Violates No Ethical Rules.

The circuit court also properly held that keyword bidding is reasonable from an ethical standpoint. (R.133:25) Defendants’ experts opined that defendants’ conduct “was in full compliance with the Wisconsin Rules of Professional Conduct in this matter.” (R.100:13; Rpt.p.10)(R-App.129); see

(R.98:5-6; Rpt.pp.2-3)(R-App.108-09)(R.93:132;Exh.6 p.49) The circuit court noted plaintiffs' inability to "find any decision of a regulatory or adjudicative body" stating otherwise. (R.133:25)

The only known case involving competitor keyword bidding by an attorney resulted in no ethics violation. In 2004, a Kentucky legal ethics attorney, Benjamin Cowgill, bid on a Google keyword coinciding with the name of a competitor attorney, Peter Ostermiller. (R.97:4 at ¶¶9-12)(R-App.220-21) The Kentucky Attorneys' Advertising Commission, an agency of the Kentucky Supreme Court and Bar Association, which enforces attorney advertising rules and regulations, (R.97:9-10 at ¶26)(R-App.225-26) took no action following its review of Cowgill's sponsored link. (R.97:10 at ¶28)(R-App.226)

Will Hornsby, counsel in the ABA's Division of Legal Services and (R.102:1 ¶1, Exh.A) has been described as "the king of legal ethics and lawyer marketing on the Internet." (R.102:1 ¶4, Exh.C p.2) He defended Attorney Cowgill:

So I go to Google and type in lawyer ethics Ostermiller. The search comes up with sites to...some blog about law firm marketing..., along with Peter Ostermiller. On the other side of the page, in a shaded area that I know to include advertisements, is a link to the site of Ben Cowgill, apparently another lawyer who is also an expert on disciplinary matters.

From my point of view, this search has now given me a choice. One lawyer may be too expensive, not available, or subjectively just not a good fit for me. *I don't see it as misleading. To me, it's a matter of obtaining more information*

about an issue of critical importance. It is from this perspective that lawyers have the First Amendment right to advertise. (Italics in original)

(R.102:1 ¶3 Exh.B)

In the eight years since the Cowgill incident, no legal ethics board or ethics opinion has condemned competitor keyword bidding. (R.93:166; Exh.7 p. 108)(R.102:2 at ¶6) Even plaintiffs' legal marketing expert, Larry Bodine, acknowledged that he cannot cite to any ethics rules, opinions or articles that condemn this practice, or label it unethical or unreasonable. (R.93:259,265; Exh.12 pp.34,35,120)

Plaintiffs abandon their "unethical" argument on appeal, now asserting "the issue of attorney ethics is not relevant in a privacy invasion claim." (Brf. at 57) Plaintiffs brought attorney ethics into this dispute and convinced the circuit court it was relevant to the reasonableness inquiry. (R.107:132-33,152-53) They are estopped from now claiming it is irrelevant just because the court found nothing unethical about the practice. See [State v. Ryan](#), 2011 WI App 21, ¶28, 331 Wis.2d 491, 796 N.W.2d 23, ("Judicial estoppel binds a party to a position previously taken by that same party.").

There is no basis to revisit the circuit court's conclusion that "there is no support for plaintiffs' arguments that the principles of attorney conduct make [defendants' action] unreasonable." (R.133:25)

3. Bidding On Competitor Keywords To Produce A Sponsored Link Is Not Confusing Or Deceptive.

Both plaintiffs' admissions that they have no evidence that anyone in the world has been confused or deceived by defendants' sponsored link reflect the patently obvious. (R.93:114-15; Exh.5 pp.100, 109)(R.93:86-87; Exh.4 at pp.39-40)(R.93:99-100, 104; Exh. 4 pp.79-80, 133)(R.93:104; Exh.4 p.133) See supra Background I.D. The defense experts share this view. Thomas Johnston stated:

[T]here is no confusion because the wording of Cannon & Dunphy's sponsored link is quite distinct from the wording of the organic search result for the Habush Firm. Neither includes any of the names of the other company. Additionally, if a user were to mistakenly click on Cannon & Dunphy's ad while intending to find information about the Habush Firm, he or she will be clearly presented with a website that does not contain any information about the Habush Firm. At that point the user has the freedom to return to their original search and either click on a prior result or refine their search. (R.98:11; Rpt.p.8)(R-App.111)

Defense expert David J. Franklyn, the Director of the McCarthy Institute for Intellectual Property and Technology Law, and a fully tenured professor of trademarks and the right of publicity at the University of San Francisco School of Law, (R.101:38 Exh.2)(R-App.201) similarly stated:

It is my opinion that ... bidding on the Lawyer Surnames in question is not likely to lead to consumer confusion or deception, or detrimental consumer reliance on those names as source-identifiers or indicia of commercial identity, and does not represent the "taking" of any personal identity property right belonging to Messrs Habush or Rottier.

(R.101:5; Rpt.p.1)(R-App.168); see (R.93:133; Exh.6 p. 50) The circuit court properly concluded there was no evidence of confusion or endorsement. (R.133:23)

Having lost, plaintiffs abandon this strategy on appeal, arguing confusion or endorsement is “irrelevant.” (Brf. at 53) Again, it was the plaintiffs who interjected the element of user confusion and endorsement into this case by virtue of their complaint (R.1 at ¶24) and their experts’ opinions. (R.107:149) Having convinced the court of the relevance of these considerations, plaintiffs are judicially estopped from claiming otherwise. See Ryan, 2011 WI App 21, ¶28.

4. Others Engage in and Are the Subject of Competitive Keyword Bidding.

Before this lawsuit, other lawyers and law firms in Wisconsin were utilizing competitor keywords to alert potential clients to their firm’s services via websites. This is further evidence that the practice does not violate any rights or notion of fairness or reasonableness.⁷ For example, as of the fall of 2009, when this case was commenced:

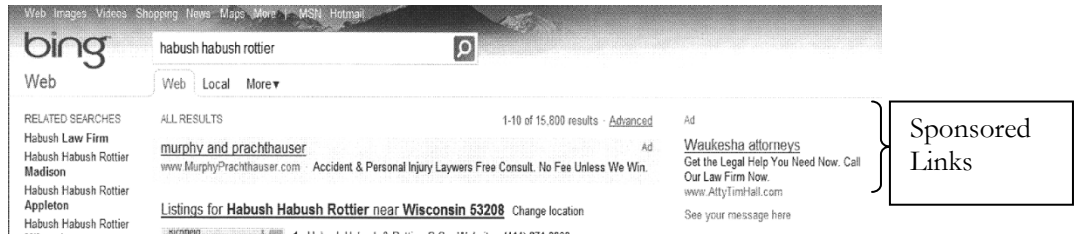
- If keywords “**gruber law offices**” were typed into Yahoo!, a sponsored link for Weigel, Carlson, Blau & Clemens, S.C. appeared. (R.94:1, 6; Exh.1A)(R-App.234-35)

⁷ The fact that these lawyers are no longer engaging in the practice is nothing but a reflection of plaintiffs’ impermissibly chilling legitimate competition in this State. See R.4.

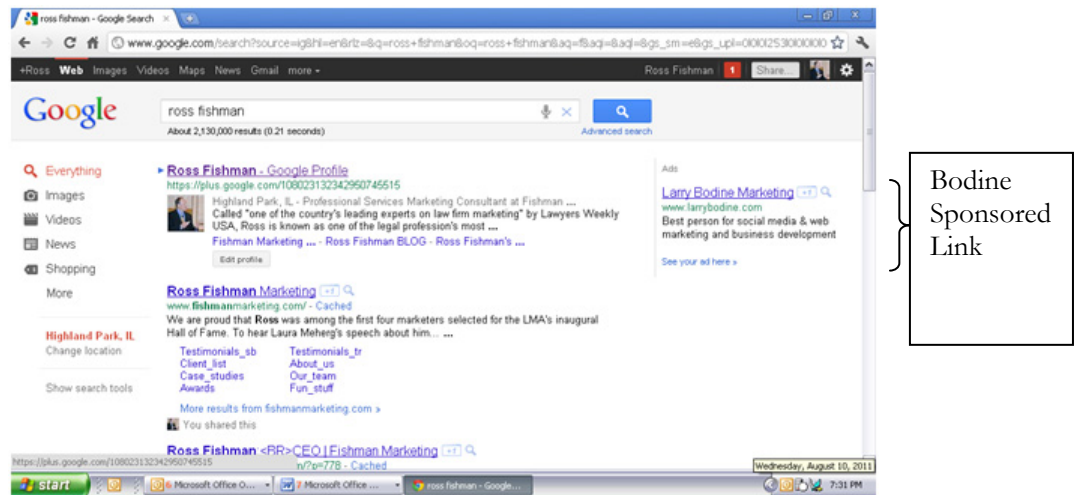
- If keywords “**cannon & dunphy**” or “**cannon dunphy**” or “**cannon dunphy law firm**” were typed into Yahoo!, a sponsored link for Weigel, Carlson, Blau & Clemens, S.C. appeared. (R.94:1, 8-12; Exhs.1B, 1C, 1D)(R-App.236-41)
- If keywords “**habush**” or “**habush habush**” were typed into Yahoo!, sponsored links for Weigel, Carlson, Blau & Clemens, S.C., as well as Cannon & Dunphy, S.C. and Habush, Habush & Rottier, S.C. appeared. (R.94:1,14-16; Exhs.1E, 1F)(R-App.242-45)
- If the keywords “**cannon & dunphy**” were typed into Google, a sponsored link to Cannon & Dunphy appeared, but clicking on the link took the user to the Gruber-Law.com website. (R.94:18 at Exh.1G)(R-App.246-47)

Other well-known local figures bid on names or portions of the names of their competitors and are themselves the subject of such bidding. As discussed, during the 2010 Wisconsin election, the names of political candidates were used by opponents to convey their message to the public. (R.94:3, 76-85; Exhs.4A-D)(R-App.305-14) Googling “scott walker” produced a sponsored link entitled “Tom Barrett for Governor.” (R.94:3, 76-78 at Exh.4A)(R-App.306-07) Similarly, typing “russ feingold” into Google, Yahoo! and Bing produced a sponsored link to “Defeat Russ Feingold” or “Retire Russ Feingold Now.” (R.94:3, 81-85; Exhs.4C&D)(R-App.310-14)(R.99:8; Rpt.p.5)(R-App.213)

Following the circuit court’s decision in this case, other attorneys again began bidding on portions of HHR firm name to produce sponsored links:



(R-App.320)(Bing results as of 10/18/11) Even plaintiffs’ expert Larry Bodine began bidding on defense expert, Ross Fishman’s name, to produce a sponsored link.



(R-App.310)⁸ These examples reflect that other well-known individuals engage in—and are the subject of—competitor keyword bidding, a practice that enhances the free flow of information to the public. (R.99:8; Rpt.p.5)(R-App.213)

⁸ This Court can take judicial notice of these Internet screen shots.

5. Bidding on Keywords to Produce a Sponsored Link is Nothing more than a Contemporary Means of Geographic Product or Service Comparison on the Internet.

The circuit court properly noted that “[b]oth parties in this lawsuit acknowledge it would be entirely appropriate for one to place an advertising billboard next to the billboard of the other.” (R.133:19) Plaintiff Rottier acknowledged that there is nothing improper about a competing law firm renting a billboard adjacent to one of HHR’s. (R.93:116-17; Exh.5 pp.111-12) He also admitted there is nothing improper with Walgreens “putting their generic brand on the shelf in the store immediately adjacent to Advil when they have their generic ibuprofen.” (R.93:118; Exh.5 pp.113) There is no suggestion of endorsement from such comparisons. (R.99:8; Rpt.p.5: “It is obvious that if we see a Miller Lite billboard adjacent to Budweiser billboard that neither is endorsing the other.”)(R-App.213). Defense expert, Thomas Johnston, summarized the concept as follows:

the use of competitor keywords is reasonable because it is simply a new form of an old method of marketing—providing comparative information such as side-by-side billboards or positioning one’s Yellow Pages book ad near the ads of others who provide similar services or products.

(R.98:11; Rpt.p.8)(R-App.111)

In addition to citing the billboard analogy, the circuit court’s analysis noted the historic applicability of this concept of physical proximity among competitors:

In the development of commerce in the United States, a frequent method of competition has been for one business to start up in close physical proximity to its competitor. This is common knowledge. A Chevrolet dealership in the post-World War II era would open shop on a large lot at the edge of town. Within a year or two, a Ford dealership was across the street. McDonalds may operate alone in a commercial district for a while, but before long, Wendy's or Burger King pops up nearby. Cannon & Dunphy, S.C. would have every right to open an office next door to Habush Habush & Rottier, S.C. This is not in dispute.

In New York and elsewhere, entire neighborhoods are dedicated (and even named for) the nature of commerce that developed there. The Garment District and the Diamond District are but two examples. The first business owner at any location may have been quite unhappy to see others come to take advantage of his or her success. But the primacy of competition as an economic policy has protected the right of others to share the block.

(R.133:18-19)

Plaintiffs make no argument why this analysis is flawed or how bidding on keywords to produce a sponsored link to a competitor's website is anything but "physical juxtaposition," or any different than the defendants' right to place a billboard advertising their legal services near plaintiffs'.

6. Comparison of Services on the Internet is a Common Marketing Practice.

Google now offers Internet users the "Pages similar," and "Something different" features which in the search results, list the competitors of the names that the user typed in the search box. These are not paid links, but are a Google feature to "assist viewers in their efforts to find a service or product." (R.100:14; Rpt.p.11)(R-App.130) Searching "habush" on Google automatically produces website links to four of HHR's competitors, including Cannon & Dunphy:

[Pages similar to www.habush.com](#)

[warshafsky](#) - Warshafsky Law Firm attorneys provide comprehensive ... - [warshafsky.com](#)

[Domnitz & Skemp](#) - Contact the Milwaukee personal injury attorneys ... - [domnitzlaw.com](#)

[Hupy.com](#) - If you want to get the maximum amount of money in the ... - [hupy.com](#)

[Cannon & Dunphy](#) - Practicing firm includes personal injury, ... - [cannon-dunphy.com](#)

(R.92:28)(R.100:18; Rpt.p.15)(R-App.134)(R.133:24) Plaintiffs' expert Larry Bodine not only acknowledged that Google' "pages similar" automatically shows competitors' names, (R.93:265; Exh.12 p.118) but that "free online directories, such as [www.Avvo.com](#)" is a "reasonable marketing option[]." (R.107:152-53)

Ross Fishman illustrated how on Avvo.com and Lawyers.com, when a viewer searches for a specific lawyer, the viewer may see not only that lawyer's profile, but information about other lawyers in the same geographic area and field of practice, i.e., competitors. (R.92:28)(R.100:29-33; Rpt.pp.26-30)(R-App.145-49) (R.100:30-32; Rpt.pp.27-29)(R-App.146-48)

The screenshot displays the Avvo.com profile for Robert L. Habush. At the top, the Avvo logo and navigation links are visible. The search bar shows "robert habush" in "Milwaukee, WI". The profile includes a photo of Robert L. Habush, an Avvo Rating of "N/A" (Not Rated), and a pie chart showing his practice areas: 50% Personal Injury, 25% Defective / Dangerous Products, and 25% Medical Malpractice. Contact information for Habush Habush & Rottier, SC is provided. An advertisement for GROTH LAW is also visible on the right side of the profile.

Mr. Fishman opined that competitive keyword campaigns “are just one facet of this landscape,” where the legal profession “is involved in a range of competitive efforts online.” (R.100:29; Rpt.p.26)(R-App.145) These efforts are reasonable and violate no right of privacy. (Id.)⁹

Judge Kahn properly considered the difficulty of enjoining defendants’ sponsored link in light of the dynamic nature of the Internet:

[T]he Internet and the search engine algorithms are constantly changing. If a sponsored link is enjoined, what about a box ad on the right column of the page?... Or one in the middle of the search results? If the ad is set-off obviously as advertising, regardless of placement, is it allowable? If Google is popping up competitor names on its own, may a purchaser get a top spot in the list of generically returned competitors?

⁹ As a matter of public policy, a ruling that competitive keyword bidding violates §995.50 will disable the effectiveness of Google and other search engines and discourage competition and the dissemination of information. As one court recognized in the context of Internet marketing:

[T]he law will destroy the valuable resource that search engines have become if it prevents those search engines from doing what they are designed to do: present users with the information they seek as well as related information the user may also find helpful or interesting.

[Mary Kay, Inc. v. Weber](#), 601 F.Supp.2d 839, 856 (N.D. Tex. 2009). This is of critical importance in a case like this. As Mr. Fishman recognized,

[T]his marketing machine that is the Habush firm...curtails competition, and we need to be very careful about squelching the ability of the consumers, the lay consumers to find alternatives.

....

If...the sponsored link program that Cannon & Dunphy engaged in is found to be impermissible, that prohibits all the other competitors who don’t have the financial resources to do something that is relatively cost-effective and informs the consumers.

.... It keeps all the little firms with great lawyers out of the market.

(R.93:170; Exh. 7 pp.122, 124)

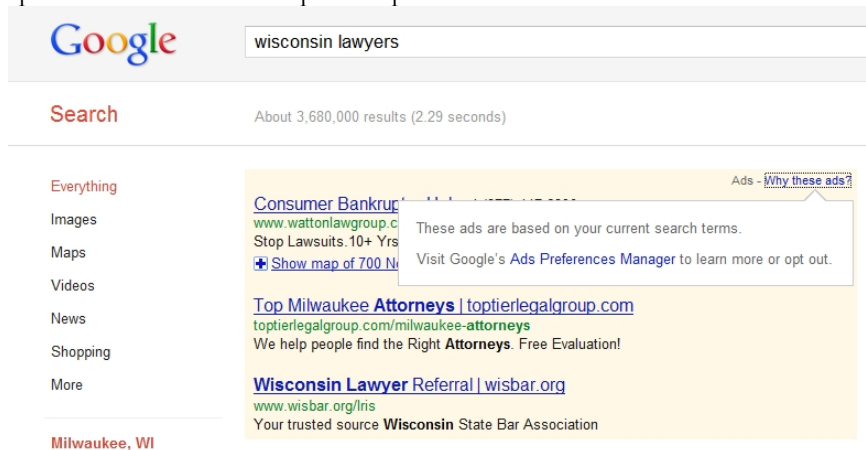
(R.133:24) The court properly considered these “Internet advertising developments” as one of the factors making defendants’ conduct reasonable as a matter of law. (R.133:24)¹⁰

II. THE ELEMENTS OF §995.50 ARE NOT MET IN THIS CASE AS A MATTER OF LAW.

There are additional bases to affirm the circuit court’s ruling. See [State v. Alles](#), 106 Wis.2d 368, 391, 316 N.W.2d 378 (1982).¹¹ Defendants maintain—as they did below (R.92:12-24)—that the definition of the right of publicity §995.50(2)(b) cannot be met as a matter of law.

Section 995.50(2)(b) sets forth the four elements of a right of publicity:

¹⁰ Google now offers Internet users the option of “opting out” of viewing sponsored links. See <http://www.google.com/settings/ads/preferences/?hl=en#optout>. Googling “Wisconsin lawyers” for example, produces the following sponsored links, including one to the State Bar. An explanatory link entitled “Why these ads?” explains the appearance of the sponsored links and the opt out option.



This Court can take judicial notice of this development. See Wis. Stat. §902.01.

¹¹ A respondent can assert error in its brief without filing a notice of appeal or cross-appeal when correcting the error “would sustain the judgment, order, or portion thereof appealed from.” [Alles](#), 106 Wis.2d at 391.

[1] [t]he use, [2] for advertising purposes, or for purposes of trade, of the [3] name, portrait or picture of any living person, [4] without having first obtained the written consent of the person....

Applying a “plain English meaning” to these elements, the circuit held they were satisfied. (R.133:10-16) Wisconsin courts applying §995.50(2)(b), however, are bound to follow New York precedent construing the elements of this subsection.

A. The History Of §995.50(2)(b) Requires Wisconsin Courts To Follow The Judicial Construction Of New York’s Right Of Publicity.

When the Wisconsin legislature adopted §895.50 in 1977 (renumbered to §995.50), only section (2)(b) was adopted from New York’s right of publicity statute. See Laws of 1977, ch. 176, at §5; [Hagen](#), at *4,5, n.4. When our legislature adopts another state’s statute, judicial decisions interpreting it are adopted as “part of the statute.” As our supreme court explained in [Ditsch v. Finn](#), 214 Wis. 305, 308, 310, 252 N. W. 562 (1934):

When a statute of one state is adopted by the Legislature of another, the interpretation given by the courts of the state from which it was adopted is a part of the statute, and the courts of the state that adopt the statute adopt the interpretation previously given by the court of the other state. (Emphasis added.)

See [In re Adams Machinery, Inc.](#), 20 Wis.2d 607, 621, 123 N.W.2d 558 (1963)(same). Wisconsin courts have routinely applied this rule of statutory construction when interpreting statutes adopted from New York. See

[Jefferson Gardens v. Terzan](#), 216 Wis. 230, 233, 257 N.W. 154 (1934); [In re Sweet's Estate](#), 270 Wis. 256, 261, 70 N.W.2d 645 (1955).

New York judicial law decided prior to 1977 establishes that where, as here, the claim is based upon an alleged use of a name for purposes of advertising or trade,

- the name must be found in or on the defendants' product or solicitation for services for there to be "use";
- when the alleged use of the name is not "part of an advertisement", it cannot be for "advertising purposes"; and
- when there is no allegation or indication that the use of the name is an endorsement or promotion of the defendants' services, the use cannot be for "purposes of trade."

See [Jansen v. Hilo Packing Co.](#), 116 N.Y.S.2d 251, 252 (N.Y. Sup. Ct. 1952); [Rand v. Hearst Corp.](#), 298 N.Y.S.2d 405, 409 (N.Y. App. Div. 1969), aff'd, 257 N.E.2d 895 (1970); [Jeffries v. New York Evening Journal Pub. Co.](#), 124 N.Y.S. 780, 781 (N.Y. Sup. Ct. 1910); [Namath v. Sports Illustrated](#), 371 N.Y.S.2d 10, 12 (N.Y. App. Div. 1975) aff'd, 352 N.E.2d 584 (N.Y. 1976); [Jaggard v. R.H. Macy Co.](#), 26 N.Y.S.2d 829, 829-30 (N.Y. Sup. Ct. 1941), aff'd, 37 N.Y.S.2d 570 (1942).

The circuit court largely disregarded these cases because they "were published decades before Google was created." (R.133:13) New technology does not dictate the abandonment of legal precedent. Principles of stare decisis require this Court to apply and follow this binding precedent. See

[Mackenzie v. Miller Brewing Co.](#), 2001 WI 23, ¶16 n.13, 241 Wis.2d 700, 623 N.W.2d 739.

B. There Is No “Use” Of A Name Under A Statutory Right Of Publicity When The Name Is Not Visible Or Found In Or On Defendants’ Product Or Solicitation For Services.

Courts considering the right of publicity require that for a name or likeness to be “used,” it must be **visible** to the public, i.e., that it be found **in** or **on** the defendant’s product or solicitation for services. See [Jansen](#), 116 N.Y.S.2d at 252; see [School of Visual Arts v. Kuprewicz](#), 771 N.Y.S.2d 804, 812 (N.Y. Sup. Ct. 2003) (absent indication that “actual name was used on the job postings” on websites, name was not “used,” requiring dismissal of publicity claim). In short, plaintiffs’ name must somehow be *displayed* for there to be “use.”).

The undisputed evidence establishes that “habush” or “rottier” are not used, displayed or found within defendants’ sponsored link, nor are such keywords visible to the Internet user. (R.1 at Exhs.A-C)(R.98:10; Rpt.p.7)(R-App.110)(R.133:23)(R.93:263; Exh.12 p.102) While the circuit court stated that the search terms “habush” or “rottier” appear “in close proximity” to the sponsored link, (R.133:11) the keywords are the result of the consumer’s decision concerning which words to type into the search engine to produce desired results. They are not seen or displayed either in the sponsored link or the website address.

Plaintiffs note that bidding on keywords has been found to be “use in commerce” for purposes of a trademark claim. (Brf. at 30) “Use in commerce” under the Lanham Act only denotes that the “defendant’s conduct affects interstate commerce” sufficient to establish jurisdiction. [Browne v. McCain](#), 612 F.Supp.2d 1125, 1131-32 (C.D. Cal. 2009). “Use in commerce” as a “jurisdictional predicate,” does not mean that the keywords were actually “used” as that word is commonly applied in a right of publicity case. See [Experience Hendrix v. Electric Hendrix, LLC](#), 2008 WL 3243896 (W.D. Wash. 2008) (“[t]rademark rights and publicity rights are distinct rights that are analyzed under different standards”).

This case is also readily distinguishable from the “Crazylegs” case where the plaintiffs’ nickname was used on the product container as well as in S.C. Johnson’s marketing campaign. See [Hirsch v. S.C. Johnson & Son, Inc.](#), 90 Wis.2d 379, 382, 280 N.W.2d 129 (1979). Here, the appearance of sponsored links in response to a keyword is no more a “use” of a name than placing Advil on the shelf next to Tylenol, or telling a billboard company to put the Cannon billboard next to the Habush billboard. Even plaintiffs’ expert acknowledged that such marketing tactics are not unreasonable. (R.93:266; Exh.12 p.157)

Q. For somebody to go to a billboard company and say if the Hupy and Abraham law firm puts up a billboard, I want to buy a billboard immediately alongside of it. So there are two

components, purchase and tying it to a name. Do you find that at all unreasonable?

A. Not under the Wisconsin privacy statute.

Q. Now separating it from the Wisconsin privacy statute, do you find it unreasonable at all in a competitive fair market economy?

A. No.

(R.93:267; Exh.12 pp.159-60) Case law is in accord. See [New Kids](#), 971 F.2d at 310.

C. Plaintiffs Cannot Establish Use “For Purposes of Advertising or Trade” Under §995.50(2)(b) Because There Is No Promotion or Endorsement.

For almost a hundred years, courts have required the name to be “part of an advertisement” itself to constitute “advertising purposes.” [Jeffries](#), 124 N.Y.S. at 781. Because there is no evidence that habush or rottier was “used” in the defendants’ website, the sponsored link to the website, or in any other manner violative of the statute, plaintiffs cannot meet the “advertising purposes” subsection (2)(b) as a matter of law.

Applicable law also requires there to be an expression that plaintiff is promoting or endorsing the defendants’ goods or services to constitute “for purpose of trade.” See [Namath](#), 371 N.Y.S.2d at 12; [Jansen](#), 116 N.Y.S.2d at 252 (photographs of professional baseball players on popcorn bags was not actionable absent “any mention that plaintiffs or any of them indorses the product.”). There is no evidence in this case—and nothing on or in

defendants' website or sponsored link—that even hints that plaintiffs are endorsing or sponsoring defendants' legal services. As Attorney Bakke opined:

There's a common understanding that the placement of the link has nothing to do with endorsement or approval of a product or a site. (R.93:133; Exh.6 p.50)

What plaintiffs' complaint really boils down to is that the physical juxtaposition of the law firms' website links next to one another violates the statute. The absurdity of that position is readily demonstrated by plaintiffs' ³/₄ page ad in the Yellow Pages. (R.94:2, 20; Exh.2)(R-App.248-49) The ad included the firm's name, a picture of plaintiff Habush, a list of his personal awards and the work HHR does. (Id.) It is juxtaposed to an alphabetical listing of attorneys beginning with End, J. Michael, a well-recognized and respected personal injury attorney in Milwaukee. (Id.) Potential clients looking up Attorney End in the Yellow Pages will see plaintiff Habush and his ad. As such, HHR paid for the right to have their ad juxtaposed to a listing of its competitors.

If plaintiffs' position is correct, §995.50 would have direct application to the plaintiffs' marketing because they are buying the right to a favorable position in an advertising medium. This is clearly not the import of §995.50. Juxtaposition of an ad is not "unreasonable" under the statute. (R.93:131; Exh.6 p.43)(R.98:10; Rpt.p.7)(R-App.113) See [Wallach v. Bacharach](#), 80 N.Y.S.2d 37, 38-39 (N.Y. Sup. Ct.)(holding the right of publicity does not

“prohibit the mention of a person’s name in a commentary or news report” because it is “in physical juxtaposition to advertising matter.”), aff’d, 84 N.Y.S.2d 894 (N.Y. App. Div. 1948). This case is even farther removed from Wallach as the sponsored link to defendants’ website is found in the clearly denoted sponsored search results. The “purposes of trade” standard cannot be satisfied to preclude such comparative marketing as a matter of law.

D. Plaintiffs Cannot Satisfy The “Without Written Consent” Element Of §995.50(2)(b).

Plaintiffs cannot satisfy the “without written consent” element of §995.50(2)(b) because plaintiffs gave written consent for their names and other website information to be searched, indexed, displayed and bid upon as keywords on the Internet.

1. Plaintiffs are Bound by the Terms of the Google and Yahoo! Contracts Agreed to by Their Authorized Representative.

The Habush firm’s participation in the Google AdWords and Yahoo! Search programs was instituted and managed by an employee of HHR who had plaintiffs’ authority to, and did accept the terms and conditions of the Google and Yahoo! contracts. (R.93:112 Exh.5 p.51)(R.103 at ¶¶1-3)(R.93:98; Exh.4 p.51) See Everlite Mfg. Co. v. Grand Valley Mach. & Tool Co., 44 Wis.2d 404, 410, 171 N.W.2d 188, 190 (1969) (party is be bound by a contract entered into by an agent acting with actual or apparent authority to do so).

That the contract was created through the Internet makes it “no less a contract.” See [Forrest v. Verizon Communications, Inc.](#), 805 A.2d 1007, 1012 (D.C. 2002). This type of contract is a “clickwrap agreement” that “requires that a user consent to any terms and conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction.” [Feldman v. Google, Inc.](#), 513 F.Supp.2d 229, 236 (E.D. Pa. 2007). Courts regularly uphold these agreements. See (R.92:18 at n.7)

2. Plaintiffs Consented in Writing to “Habush” and “Rottier” Being Searched, Indexed, Displayed and Bid Upon As Keywords.

To create Google AdWords and Yahoo! Search accounts, the user is required to click on an “I agree” or “I accept” button to reflect acceptance of the contractual terms. (R.103;Exhs.1-3&4 ¶16) See [Person v. Google Inc.](#), 456 F.Supp.2d 488, 493 (S.D.N.Y. 2006)(“[P]rior to using AdWords, every customer must click on a box acknowledging that they agree to the terms and conditions of [the] contract.”).

The Google Terms of Service provide not only that they are “binding,” but that:

8.1 You understand that **all information (such as data files, written text, computer software, music, audio files, or other sounds, photographs, videos or other images)** ... are the sole responsibility of the person from which such content originated. All such information is referred to below as the “Content”.

(R.103:1, 4, 6; Exh. 1)(Emphasis added).¹²

Two separate sections of the Google Terms of Service provide plaintiffs' authorization for others to bid on keywords such as "habush" and "rottier." First, §17.1 and §17.3 expressly state that Google can place advertising on the "services," (i.e., the "web" per §1.1) that targets the **content** of plaintiffs' website.

17.1 Some of the Services are supported by advertising revenue and may display advertisements and promotions. **These advertisements may be targeted to the content of information stored on the Services, queries made through the Services or other information.**

...

17.3 In consideration for Google granting you access to and use of the Services, you agree that Google may place such advertising on the Services.

(R.103:1,11; at Exh. 1)(Emphasis added). By agreeing to §11.1 and §11.2, HHR granted Google and all AdWords participants a limited license to use this "content" for its services:

11.2 You agree that this license includes a right for Google **to make such Content available to other companies, organizations or individuals with whom Google has relationships for the provision of syndicated services, and to use such Content in connection with the provision of those services.**

(R.103:8; at Exh.1)(Emphasis added.)

¹² The Yahoo! Master Terms and Conditions and Program Terms contains a similar provision. (R.103:1,17,19; at Exh.4) Plaintiffs' consent by virtue of Google AdWords applies equally to other Internet search engines.

Plaintiffs' expert, Larry Bodine, who has first-hand experience in reviewing and accepting the Google AdWords terms and conditions on behalf of clients, (R.93:260; Exh.12 pp.92,94) acknowledged that:

Q. So when Habush Habush & Rottier entered into the sponsored link pay-per-click services of Google, they were advised, weren't they that Google, by granting them that access, may place advertising on the services, correct?

A. Correct.

(R.93:261; Exh.12 pp.94-95) Bodine admits that §17.1-17.3 apply to sponsored links and that Google advised HHR that ads displayed could be targeted to their "content." (R.93:263-64; Exh.12 pp.105-06)

These contractual provisions grant Google and its AdWords clients, including defendants, the right and license to place advertisements and sponsored links targeting plaintiffs' "content" on Google. These provisions are enforceable. See [Feldman](#), 513 F.Supp.2d 229 (E.D. Pa. 2007)(enforcing Google AdWords and Yahoo! Service contracts against attorney). By accepting the Google terms, plaintiffs consented to Google to making "habush" and "rottier" (i.e., "written text" pursuant to §8.1) and other information on plaintiffs' website available as keywords to defendants and any other user of AdWords.

That plaintiffs may not have anticipated the ramifications of their consent or intended for such consent to apply to the current litigation is of no consequence. See [Faloona v. Hustler Magazine, Inc.](#), 607 F.Supp. 1341, 1360

(N.D. Tex. 1985)(plaintiffs' consent to photographs in textbook was valid for purposes of the photos being republished in Hustler book review), aff'd, 799 F.2d 1000 (5th Cir. 1986), cert denied, 479 U.S. 1088 (1987).

III. THE SHAREHOLDER STANDING RULE PRECLUDES PLAINTIFFS' CLAIMS.

Judge Kahn found no “unreasonable” invasion of privacy, in part, because “plaintiffs have chosen to intertwine their own names into the firm in which they hold shares,” concluding that as “plaintiffs have made their names inseparable from the firm name...any unreasonableness in using those names is reduced by the dual meanings they carry.” (R.133:20-22); see [Button v. Hoffman](#), 61 Wis. 20, 21-25, 20 N.W. 667 (1884)(“with a corporation; its members, as natural persons, are merged into the corporate identity.”). This also demonstrates that Habush and Rottier never had standing to bring this lawsuit.

Habush and Rottier filed their claim as HHR shareholders, alleging their injury “results from the defendants distracting consumers.” (R.1 ¶¶1-2,24). Black-letter law provides that when the “primary injury”—here, alleged diversion of prospective clients—is to the corporation, the individual shareholders cannot state claims. [Krier v. Vilione](#), 2009 WI 45, ¶¶31, 33, n.13, 317 Wis.2d 288, 766 N.W.2d 517.

The individual plaintiffs elected to practice law as shareholders of a corporation and reaped such benefits by having no personal liability for corporate wrongs. The law recognizes, *quid pro quo*, that plaintiffs gave up the right to seek personal redress for primary harms to their corporation. After reaping the advantages of that “corporate structure when it inures” to their benefit, they cannot now “ignore the constraints of corporate law when it does not.” [Krier](#), 2009 WI 45, ¶26. In return for the “several advantages” of the corporate form, plaintiff-shareholders gave up “several prerogatives, **including that of direct legal action to redress an injury to [them]....**” [Virnich v. Vorwald](#), 677 F.Supp.2d 1066, 1072 (W.D. Wis. 2009) (Emphasis added)(dismissing plaintiff-shareholders’ claims for injury to their reputation under §134.01 because the injuries were not “direct, personal and independent of the injuries to the corporation and distinct from the injuries to other shareholders.”).

Application of these principles foreclosed the individual claims of attorneys in a law firm in the analogous case of [Saxe, Bacon & Bolan, P.C.](#), 521 F.Supp. 1046 (S.D.N.Y. 1981). There, individual attorneys and their law firm sued Martindale-Hubbell for failing to include them in its law directory, alleging loss of “substantial legal business and recognition in the legal community and public sector.” *Id.* at 1047. The court held the individual

attorneys' claims related to "an indirect or incidental injury necessarily suffered by an individual affiliated with a directly injured corporation for which the individual has no cause of action separate from that of the corporation." Id. at 1049.

Here, the circuit court did not apply the shareholder standing rule because the plaintiffs were seeking an injunction and not monetary damages. (R.146:62-63,108-09) This was contrary to law. See [Rose v. Schantz](#), 56 Wis.2d 222, 229-30, 201 N.W.2d 593 (1972) (applying shareholder standing in an injunction case). The circuit court also held that the shareholder standing rule does not apply because "harm" is not an element of the injunction sought under §995.50. (R.147:15,16,29) The shareholder standing rule, however, focuses on which party's "rights" or interests the complaint really seeks to enforce—as opposed to the elements of the cause of action—to ensure that shareholders do not disregard the corporation entity. [Rose](#), 56 Wis.2d at 229-30.

There is no requirement that "harm" be an element of the claim before courts can prevent individual shareholders from ignoring the corporate identity. If that were the legal test, it would create the absurd result of the shareholder standing rule applying when monetary damages are sought, but

not when equitable relief is sought. The shareholder standing rule bars plaintiffs' lawsuit.

IV. DEFENDANTS' ACTIONS ARE PROTECTED BY THE FIRST AMENDMENT.

The circuit court's judgment is also supported because defendants' actions are constitutionally protected. See Wis. Stat. §995.50(3)(recognizing "defenses of absolute and qualified privilege," including "regard for maintaining freedom of communication, privately and through the public media.").

"Commercial speech" was given First Amendment protection in [Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council](#), 425 U.S. 748, 761 (1976). A year later, the Court held that lawyer advertising was commercial speech under the First Amendment. [Bates v. State Bar of Arizona](#), 433 U.S. 350, 363, 364 (1977). The [Bates](#) Court held that lawyer advertising "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." Id.

The Supreme Court's decision in [Peel v. Attorney Discipline Comm.](#), 496 U.S. 91 (1990), sets the groundwork for whether lawyer marketing is protected by the First Amendment. At issue was whether a lawyer's public statement that he was a certified trial specialist from the National Board of

Trial Advocacy was constitutionally protected. The lower courts found the notation “misleading” on its face, or impliedly misleading at best, because consumers may not appreciate the difference between being licensed and being certified. The Supreme Court reversed.

The Court found it was undisputed that the lawyer was a certified trial specialist, and there was no evidence that anyone was actually or potentially misled or deceived by such advertisement. Id. at 100-01, 106. Further, the juxtaposition of the lawyer’s licensure with his certification was not deceptive, as the texts were separate and appeared in different places. Id. at 103. The Court “reject[ed] the paternalistic assumption” that the public could not understand the difference, holding that accurate information “facilitates the consumer’s access to legal services and thus better serves the administration of justice.” Id. at 105, 110.

Under [Bates](#) and [Peel](#), the defendants are entitled to summary judgment. The public has a right to know about truthful information regarding legal services. As defense expert David J. Franklyn, made plain: “There’s a constitutional interest in the free flow of information for the protection of consumers.” (R.93:195;Exh.8 p.92) Plaintiffs make no claim that the content of defendants’ sponsored link is misleading. Defendants’ website link is separated in both text and position from plaintiffs’, and nothing

about it is even potentially misleading. Raising the specter of diversion of business off the plaintiffs' surnames (with no proof), or of deception to justify blanket suppression of commercial speech does not make the grade. [Central Hudson Gas & Electric Corp. v. PSC of N.Y.](#), 447 U.S. 557, 569 (1980)("[C]onditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.>").

This case is really about plaintiffs disliking what the defendants are doing. Marketing that plaintiffs find "personally offensive" and contrary to "notions of decency" (Brf. at 66) is not excluded from First Amendment protection. [In re R.M.J.](#), 455 U.S. 191, 205-06 (1982)(ads that are not misleading but in "bad taste" are still protected speech).¹³

V. PLAINTIFFS' "UNCLEAN HANDS" PREVENT THEM FROM OBTAINING INJUNCTIVE RELIEF AS A MATTER OF LAW.

A. Plaintiffs Seeking Equitable Relief Must Have "Clean Hands."

Black-letter law establishes that an "injunction is equitable relief," [Fields Foundation, Ltd. v. Christensen](#), 103 Wis.2d 465, 486, 309 N.W.2d 125 (Ct. App. 1981), and that "one seeking affirmative equitable relief must have 'clean hands' before the court will entertain his or her plea." [Hendricks v. MCI, Inc.](#), 152 Wis.2d 363, 368, 448 N.W.2d 289 (Ct. App. 1989); see

¹³ Notably, plaintiffs have made no complaint to the Office of Lawyer Regulation regarding defendants' sponsored links.

Restatement (Third) of Unfair Competition cmt. b §48 (1995) (injunctive relief in a right of publicity case “may be limited by the equitable principles of...unclean hands.”) Any conduct by the plaintiff that is “tainted with inequit[y] or bad faith relative to the matter in which he seeks relief” will close the doors of equity “however improper may have been the behavior of the defendant.” [Precision Instruments v. Automotive Maintenance Machinery](#), 324 U.S. 806, 814 (1945).

Well-established case law applying the doctrine of “unclean hands” establishes that principles of equity preclude plaintiffs from enjoining competitors when plaintiffs have engaged in similar conduct. See [Haagen-Dazs, Inc. v. Frusen Gladje Ltd.](#), 493 F.Supp. 73, 75-76 (S.D.N.Y. 1980)(denying Haagen-Dazs injunctive relief where defendant created “false impression” its ice cream was made in Sweden because plaintiff had similarly packaged its product and “is guilty of the same deceptive trade practices... they may not secure equitable relief simply because defendants’ hands may be a shade or two less clean.”); see [Stokely-Van Camp, Inc. v. Coca-Cola Co.](#), 646 F.Supp.2d 510, 533-34 (S.D.N.Y. 2009)(plaintiff SVC (manufacturer of Gatorade) denied injunctive relief precluding marketing by Coca-Cola (manufacturer of Powerade) because “having jumped on the bandwagon of

calcium and magnesium first, [SVC cannot] now jump off and claim that Coca-Cola must get off too....”; SVC’s unclean hands preclude an injunction).

B. Plaintiffs Engaged In The Same Or Worse Conduct Than Defendants, Thereby Precluding Their Request for Injunctive Relief.

Before, during and after filing this lawsuit, plaintiffs were engaged in Internet marketing campaigns that—to borrow their phrase—“exploited” the names of the living and dead for “advertising purposes.”

1. Plaintiffs Used the Names of Accident Victims to Market Themselves.

The first of plaintiffs’ marketing campaigns gives plaintiffs’ use of the terms “offensive” a whole new meaning. Plaintiffs post a blog on the Internet promoting HHR’s legal services. See <http://www.habush.com/blog/>. The blog is not truly a “blog,” but is comprised of paraphrased or sections of news articles reporting on tragic accidents in which individuals were seriously injured or killed. (R.114:3-4 & Exh.C) It is known as a “spam blog,” which is “a very tasteless form of law firm blogging.” (R.114:2) Lexblog, a blog on law firm marketing written by nationally known blogger, Attorney Kevin O’Keefe, describes spam blogs as:

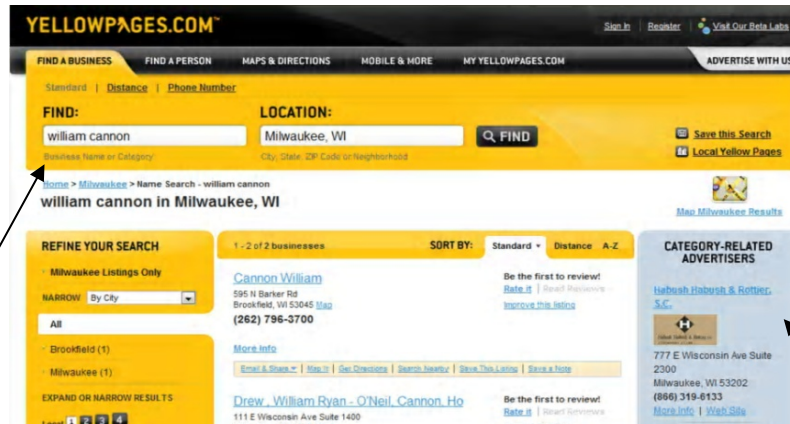
blog sites with inauthentic text or text merely stolen or paraphrased (blog scraping) from other websites. The purpose of such a blog is to get high Google search results in order to sell ads on the spam blog or to link to other websites in an attempt to improve the search engine performance of the site.... (R.114:2,12-14,Exh.B)

The Habush firm’s spam blog has numerous postings—many lifted

directly from the original news source without attribution—where the firm is using the names of persons (usually victims) to market the firm’s legal services. (R.114:3-4) These entries “assist[] in moving” HHR “higher up on the first page of search results,” in some cases, are a “direct appeal for someone with a similar situation to contact” a HHR lawyer, and markets HHR to family members or friends of the victim who read the post and are encouraged to contact HHR. (R.114:3)

2. Plaintiffs were Using the Names of Other Lawyers to Market Themselves.

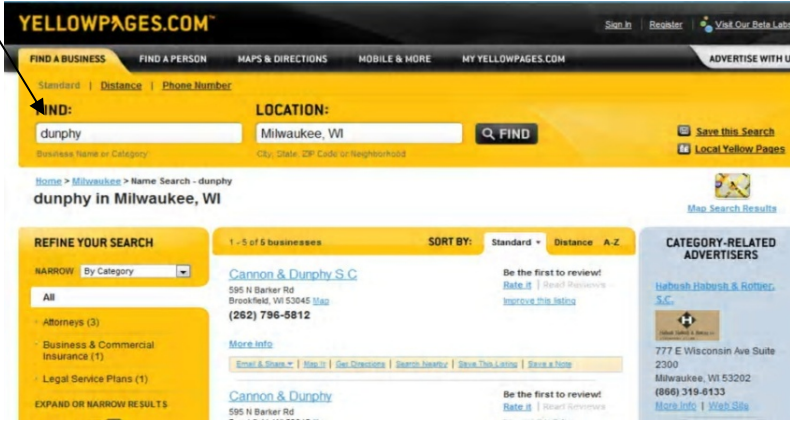
Prior to and when plaintiffs sued the defendants, they were engaged in a substantially similar marketing campaign as defendants such that when an Internet user typed in “cannon” or “dunphy” or other iterations of personal injury lawyers’ names or their firms into www.yellowpages.com, www.AnyWho.com, and 411.yellowpages.com, a HHR logo appeared in an adjacent “category related advertisers” box, along with a link to HHR’s website and telephone number. Numerous examples are contained in the record. (R.92:38)(R.94:2, 21-75; Exh.3A-C)(R-App.250-304) The following is illustrative:



Keyword that is competitor of plaintiffs is typed into search box

(Yellowpages.com screen shot for “william cannon,” R.94:2,27, at Exh.3A)(R-App.256)

Habush firm name, logo, 866-phone number and a link to the firm website appears adjacent to organic search results



(Yellowpages.com screen shot for “dunphy,” R.94:2,29;Exh.3A)(R-App.258)

In addition to Attorneys Cannon and Dunphy, plaintiffs linked the display of their firm information and logo to other attorneys on these websites. (R.94:2, 21-75; Exh.3)(R-App.250-68) These websites operate *by category*, meaning that the ad is tied to and displayed whenever any lawyer’s name in a particular category is entered, i.e., “attorneys,” “accident and property damage attorneys,” and “personal injury law attorneys.” (R.53:2) As AT&T’s general manager of yellowpages.com testified, by purchasing a tile ad

bundle, the customer purchases a category of lawyer names. (R.112:80,81-82; Exh.13 pp.9,45-46)¹⁴

This practice of buying baskets of competitor's attorneys' names is substantially similar to bidding on keywords on Google or Yahoo! in terms of the **forum** in which they occur, the **goal** of the programs, the **appearance** of the information, the manner in which the programs are **implemented**, the **results** they show, and the **policy** underlying the marketing practices.

(R.98:10-11; Rpt. at pp.7-8)(R-App.110-11) As Ross Fishman opined:

Regardless of the way in which the plaintiffs secured this placement, the visual impact is nearly identical to, but in fact *more* prominent than, the visual display by the defendants when information about that firm appeared on Google....(R.100:41; Rpt.p.38)(R-App.157) (Emphasis added.)

Plaintiff Habush acknowledged that plaintiffs' yellowpages.com marketing is "functionally similar" to defendants'. (R.93:91-92; Exh.4 pp.44-45)

Plaintiffs come to this Court with unclean hands, thereby precluding their claim for relief and requiring dismissal of this case. Having jumped on the bandwagon of Internet comparative advertising both through

¹⁴ The appearance of the Habush firm logo and website link was not inadvertent or unauthorized. Megan Daly, who handled HHR's yellow pages advertising, testified she sent plaintiff Habush a copy of how the ad would appear and it was approved. (R.93:250;Exh.10 p.89) Any claim by plaintiffs to the contrary (R.93:87-88;Exh.4 pp.40-41)(R.146:106-07) strains credulity, especially given their blog that intentionally used the names of injury victims. (R.51 at ¶11)(R.41; Rottier Aff. ¶6)(R.93:87-88;Exh.4 pp.40-41)

Yellowpages.com¹⁵ and their spam blog, plaintiffs cannot jump off the bandwagon and demand that defendants get off too.

CONCLUSION

For these reasons, defendants-respondents respectfully request that the circuit court's judgment dismissing this case be affirmed.

Dated at Milwaukee, Wisconsin this 17th day of January, 2012.

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¹⁵ After plaintiffs' Yellowpages.com pop-up ads in searches for other lawyers' names was disclosed in court, plaintiffs claimed—after discontinuing those ads—that they differed from sponsored links. This was not just disingenuous, but really, an admission of “Do as I say, not as I do.”

CERTIFICATION REQUIRED
BY SEC. 809.19(8)(D), Wis. Stat.

I hereby certify that this brief conforms to the rules contained in §§809.19(8)(b), Wis. Stats. for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,988 words.

Dated at Milwaukee, Wisconsin this 17th day of January, 2012.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)(F)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated at Milwaukee, Wisconsin this 17th day of January, 2012.

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**DEFENDANTS-RESPONDENTS' RESPONSE BRIEF
APPENDIX CERTIFICATION**

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains:

1. a table of contents;
2. relevant trial court record entries;
3. the findings or opinion of the trial court; and
4. portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: January 17, 2012

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CERTIFICATE OF MAILING

I certify that this brief and separate appendix were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail on January 17, 2012. I further certify that the brief and separate appendix were correctly addressed and postage was prepaid.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I filed with the Court by first class mail and served copies of Defendants-Appellants' Brief and separate Appendix upon counsel for the parties by first class mail:

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