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OF WISCONSIN**

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.

**COMBINED REPLY BRIEF AND SUPPLEMENTAL
APPENDIX OF PLAINTIFFS-APPELLANTS
ROBERT L. HABUSH AND DANIEL A. ROTTIER**

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Defendants-Respondents (“Cannon”) employ the same shotgun-defense approach advanced in the trial court to obscure the undisputed fact that they are utilizing the individual names of Plaintiffs-Appellants (“Habush” and “Rottier”) in a manner which intentionally seeks to take advantage of the reputational and other commercial value associated with those names for an advertising purpose. And they cite no authority to refute the point, as expressed in Restatement (Second) of Torts § 652C cmt. c (1977), that capitalizing on the commercial value associated with another person’s name for an advertising purpose is precisely what the tort underlying Wisconsin Statutes section 995.50(2)(b) was designed to protect against.

APPROPRIATE STANDARD OF REVIEW

Cannon cannot now be heard to argue that some deference should be given to the decision of the trial court. Cannon asserted on summary judgment that unreasonableness was a question of law and that there were no disputed material facts. (R.92:11, 26.) Moreover, unlike in *Pollack v.*

Calimag, 157 Wis. 2d 222, 239-240, 458 N.W.2d 591 (Ct. App. 1990), in this case the parties agreed, and the trial court found (A-App.6, R.133:5) that there were no disputed issues of fact to be decided and applied to the legal issue of reasonableness in the context of Section 995.50. As such, the review here should be *de novo*.

ARGUMENT¹

I. UNREASONABLENESS IS NOT A SEPARATE ELEMENT OF A SUBSECTION (2)(B) CLAIM.

In arguing that the meaning of “unreasonably invaded” is “plain” and serves as a separate element of a Section 995.50 violation, Cannon ignores the incongruity which such an interpretation presents. Unaddressed is the fact that subsections (2)(a), (c) and (d) set forth express unreasonableness standards by themselves. The legislature did the same implied unreasonableness balancing in arriving

¹ Cannon complains that they did not receive a pre-suit notice letter from Habush and Rottier, seeming to imply that if they had they would have stopped this keyword name-use. This is somewhat curious given that it was known to Habush that another attorney previously sent Cannon a cease-and-desist letter regarding the same advertising tactic and Cannon ignored it. (R.4.)

at the prohibitive language in Subsection (2)(b). Also, Cannon does not refute the clear superfluity of an additional unreasonableness requirement nor explain how this can be reconciled with longstanding principles of statutory construction cited in Habush's initial brief.

The cases referenced by Cannon do not stand for the proposition that unreasonableness is an element of misappropriation claims at common law. First, *Zinda* dealt with a (2)(c) claim (which already requires "unreasonable publicity") and is therefore irrelevant to whether unreasonableness needs to be separately shown for a (2)(b) claim. *See Zinda v. La. Pac. Corp.*, 149 Wis. 2d 913, 929, 440 N.W.2d 548 (1989). Further, the *Zinda* court did not include in its recitation of the (2)(c) elements a separate unreasonableness requirement, which refutes Cannon's construction of the privacy statute. *See id.* at 929-30. Moreover, neither Massachusetts case nor the Tennessee case cited by Cannon was a misappropriation case. They instead involved claims based on the more traditional "leave me

alone” right-of-privacy statute or common law which, like Wisconsin’s other privacy protections, has an explicit unreasonableness requirement. *Compare* Mass. Gen. Laws ch. 214, § 1B *with* Wis. Stat. § 995.50(2)(a) & (2)(c); *see also* *Martin v. Senators, Inc.*, 418 S.W.2d 660, 662-63 (Tenn. 1967). Also, Cannon failed to mention that Massachusetts has a separate statute on the use of a name or likeness for advertising purposes, which does not have a separate unreasonableness element. Mass. Gen. Laws ch. 214, § 3A. Therefore, the Massachusetts cases cited do not support the argument that a (2)(b) claim requires a separate showing of unreasonableness.

The reference to “unreasonably invaded” was meant to introduce the four subsections of 995.50, not to modify them.

II. CANNON’S USE OF NAMES FOR COMMERCIAL BENEFIT IS UNREASONABLE.

Even if “unreasonably” is viewed as a separate element of a (2)(b) violation, Cannon does not explain how the broadly unlimited definition of “unreasonably” applied by

the trial court will avoid significantly emasculating the fundamental purpose of the statute. Cannon also does not address the point that, at most, “unreasonably” should be interpreted so as to prevent incidental or trivial uses, which are not designed to exploit the goodwill associated with a person’s name, from being actionable — similar to what the courts in New York and other states accomplish through the application of the “incidental use” doctrine. (App. Br. 36-44.)

When another’s name is used for advertising or trade purposes, “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). A defendant is liable for misappropriation 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. An interpretation of “unreasonably invaded” which permits a competitor to use a person’s name in order to purposefully

capitalize on its commercial value (“local mindshare”), under the guise of reasonableness, cuts the very heart out of the protection that Subsection (2)(b) was designed to afford.

Under an appropriate contextual interpretation of “unreasonably,” none of the factors argued by Cannon should enable them to avoid the reach of Section 995.50.

Free competition is not unlimited. Restrictions, such as those which protect trade secrets, prevent patent infringement, or in this case guard against the misuse of the commercial value in an individual’s name, actually promote free competition by regulating it in a manner which assures fairness. The legislature determined that competition which depends on using the intrinsic value in another person’s name for advertising is not fair. There is no indication that the legislature intended to enable one to avoid liability for misusing another’s name by raising the specter of free competition.

Enjoining Cannon’s advertising tactic will not squelch competition nor prevent smaller firms from

succeeding. Cannon's doomsday prediction of anti-competitive results, or that the effectiveness of search engines will be disabled, is not supported by any evidence or common sense. It is undisputed that there are a myriad of ways that professionals can engage in comparative advertising without attaching their advertising to the personal names of their competitors in order to reap the reputational benefit that has been built up over time in those names. (*See* SA-App.36-37, R.124:81-82.) Furthermore, Cannon's same advertising tactic could harm competition if used by, for example, the largest plumbing company in a community to erode the market share of an individual plumber who has worked for decades to develop value and recognition in his name as the primary means of furthering his business. Competitors, no matter how big or small, should not be permitted to use the names of others, and the value associated with those names, in connection with promotional advertising under the guise of "free" competition.

If this practice were truly widespread, as Cannon asserts, there would be more evidence than two or three attorneys and a couple politicians having engaged in the practice.² (*See also* R.117:26-28.) Assuming that prevalence of this advertising tactic is even relevant to determining whether it violates our privacy statute, the vast silent majority of competitors who do not engage in this practice is testament to its unreasonableness.

To the extent proximity advertising is otherwise permissible, it becomes unlawful when the individual names of competitors are used (in this case bid on and paid for) to achieve that proximity. Cannon can point to no other method of comparative advertising where the use of the targeted person's name is what causes the competitor's advertisement to appear.

² Cannon improperly includes, and this Court should disregard, references to some alleged, isolated post-decision sponsored-link advertising (Resp. Br. 24-25), which are not part of the record, have no foundation, and are not appropriate for judicial notice.

Google’s “Pages Similar” search results are different because they occur naturally through the algorithmic function of the search engine, not as the result of the targeted use by a competitor of another’s name to trigger visibility within an audience that could not otherwise be achieved.

In raising estoppel, Cannon incorrectly asserts that Habush did not argue in the lower court that the issues of confusion and attorney ethics are immaterial to a (2)(b) claim. This was clearly argued, with established authority for the point that evidence of confusion or deception is not necessary to establish a misuse-of-name claim. (SA-App.76-86, R.17:35-37, 117:24-26, 122:9-10.) There is no legal support for the notion that, in the absence of confusion or an ethical opinion addressing this advertising tactic, a privacy-right violation cannot be shown.

However, given the trial court’s broad view of “unreasonably invaded” as a required element, Habush submitted evidence of confusion through its marketing expert, with empirical proof from the *Pew* study (A-App.106-07,

R.106:148-49), and the opinion of Professor Daniel Solove, a highly credentialed privacy expert (SA-App. 14-15, R.119:208-209).

With regard to the ethical issue, there is no way to determine from the record why the Kentucky Bar Association decided not to take any disciplinary action against attorney Cowgill, who only engaged in this practice for a short time. However, this tactic was denounced by ethics and marketing experts including Milton Freedman, a nationally known authority on lawyer ethics, who likened it to putting one's name on another lawyer's door and labeled it as "wrong." (SA-App.52-54, R.119:16-18.) *See also* the ethical opinion of former State Bar President, Thomas Basting. (A-App.89-91, R.107:132-134). The record in this case amply supports the conclusion that this invasion of privacy is unreasonable.

III. CANNON’S SECONDARY ARGUMENTS HAVE NO BASIS IN LAW OR IN FACT.

A. CANNON USES THESE NAMES FOR ADVERTISING OR TRADE.

“Use” is a simple word with a readily understandable meaning. It is undisputed that Cannon is intentionally using Habush’s and Rottier’s names by bidding on and paying money for those names as keyword-triggers for Cannon’s advertisements. (A-App.54, R.107:30; R.117:14-18.) Further, analogous trademark cases regarding pay-per-click advertising confirm that this is a “use.” *See, e.g., Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 129 (2d Cir. 2009).

Moreover, as decided by the trial court, there is no requirement, neither in the Wisconsin statute nor in any of the case law cited by Cannon, that the names must be displayed on an advertisement for there to be a use. (A-App.11-13, R.133:10-12; *see also* R.117:9-11.) The “use” element is satisfied when a name is used “in connection with” the advertisement. *See Sch. of Visual Arts v. Kuprewicz*, 771

N.Y.S.2d 804, 812 (Sup. Ct. 2003). The names are certainly used “in connection with” Cannon’s advertising, as the ads would not even exist but for Cannon’s use of those names as keyword-triggers.

False endorsement is not a required element in a privacy claim. 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:7 (4th ed. 2009). Cases cited by Cannon confirm the obvious meaning of “[t]rade purposes” — “use which would draw trade to the [defendant’s] firm.” *Kuprewicz*, 771 N.Y.S.2d at 812.

“Advertising purposes” and “purposes of trade” are useful phrases and are “used as the means to carry out the law’s fundamental purpose — the protection of an individual’s right to privacy” and the right to be free from “selfish, commercial exploitation” by others. *Rand v. Hearst Corp.*, 298 N.Y.S.2d 405, 408-09 (App. Div. 1969), *aff’d*, 257 N.E.2d 895 (N.Y. 1970). Cannon’s advertising tactic against Habush and Rottier clearly qualifies as having this advertising or trade purpose.

B. THERE WAS NO CONSENT.

Notwithstanding the trial court's rejection of this argument, Cannon continues to assert that the Google terms and conditions somehow extend to Cannon and permit their conduct. For several reasons demonstrated in Habush's summary-judgment briefing on this issue, that simply is not the case. (R.106:10-12; R.117:18-21.) Among other reasons, the Google terms do not permit any third-party beneficiary rights that could extend to Cannon, and they explicitly do not extend to any conduct that would violate privacy/publicity rights. (R.117:18-19; *see also* R.130:12, 13.) Consent for Cannon to invade Habush's and Rottier's privacy rights clearly was never given.

C. THE SHAREHOLDER STANDING RULE DOES NOT APPLY.

The shareholder/derivative action cases which Cannon cites for their contention that Habush and Rottier are barred from asserting their own personal privacy rights have no application here. (*See* R.49:3-7.) First, the question of which entity (shareholders or corporation) suffered the harm,

is not an issue here because the privacy statute provides for entitlement to relief without a showing of any harm whatsoever. (*Id.*) Second, even if harm is an issue, the privacy invasion complained of is a “direct, personal and independent” harm to the individuals, independent of any resulting harm to the firm in which they practice. *See Virnich v. Vorwald*, 677 F. Supp. 2d 1066, 1071 (W.D. Wis. 2009).

Third, to argue that individuals whose personal privacy rights have been invaded do not have standing to protect those personal rights, if they have granted their law firm the right to use their names, runs directly counter to established law and defies common sense. *See* Restatement (Third) of Unfair Competition § 46 cmt. g (1995) (notwithstanding assignment of the right to exploit one’s identity, the personal interests protected by the right of privacy remain actionable by the assignor against third persons); Restatement (Second) of Torts § 652F cmt. b (1977) (consent for one purpose does not amount to consent to another person for other purposes); *Adrian v. Unterman*, 118 N.Y.S.2d 121, 128 (App. Div.

1952.) There is no legal or logical basis for the unprecedented view that individuals lose the right to privacy protection in their names in proportion to the reputation and success of the law firm which (with consent) includes their names.

D. FIRST-AMENDMENT PROTECTION DOES NOT EXTEND TO CANNON'S CONDUCT.

For several reasons articulated in detail in Habush's summary-judgment briefing, free-speech principles do not insulate Cannon's conduct from liability. (R.117:30-38.) First, the advertising tactic in question does not even constitute speech, as acknowledged by Cannon's own expert (R-App.124, R.100:8.) and found by the lower court (A-App.7, R.133:6).

Further, even if Cannon's tactic could be considered commercial speech, the requested injunction would be a proper time, place, and manner restriction that would advance significant state interests — a restriction that the Supreme Court cases cited by Cannon bless as perfectly

permissible. *See, e.g., Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976). Indeed, Cannon would remain free to place ads with the same content (disseminating the exact same “speech”), so long as they did not use Habush’s and Rottier’s names to do so.

Well-known privacy expert, Daniel Solove, directly refutes the defense expert’s notion that Cannon’s conduct promotes the free flow of information, noting that Cannon’s conduct instead fosters negative effects like potential confusion and “usurping the value of the reputations”. (SA-App.3-4, R.119:197-98.) Moreover, “[i]mposing liability for the unpermitted taking of one’s identity to attract attention to the product or its advertisement in no way impairs the constitutional right to ‘the free flow of commercial information.’” 2 J. Thomas McCarthy, *Rights of Publicity and Privacy* § 7.3 (2d ed. 2010). The state retains its power to regulate a lawyer’s “procurement of remunerative employment” because that is “only marginally affected with First Amendment concerns” and “falls within

the State's proper sphere of economic and professional regulation." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978) (emphasis added).

E. CANNON'S UNCLEAN HANDS ARGUMENTS ARE BASELESS.

The Firm's website blog is immaterial, and assertions that it is inappropriate are an unwarranted personal attack that Cannon argues through inadmissible hearsay and innuendo. (R.123:4-5; SA-App.74-75, R.124:77-78.) The blog provides educational information for potential clients in areas that the firm practices in and, in so doing, helps create website user loyalty. (SA-App.74-75, R.124:77-78.) It does not depend on the use of a competitor's name to get advertising in front of internet searchers.

Additionally, the undisputed material facts, as found by the trial court, are that not only was Habush unaware of how the Yellowpages.com advertising program worked, but it was not at all similar to the advertising tactic in which Cannon uses for their own benefit the names of other attorneys to trigger their advertising. (R.117:39-41; *see also*

SA-App.62-69; R.107:170-179.) Rather than being an ad triggered to the searches of particular names of other individuals (as Cannon's ads are), the Yellowpages.com ad was based on categories like "Attorneys" or "Personal Injury Law Attorneys," which is one of the permissible ways in which Cannon can disseminate their advertisements to the public. (R.117:40.) The deposition testimony of an AT&T representative, in response to questioning by the Cannon attorney, is dead on the mark: "They [Habush and Rottier] in no way purchased the causal relationship that their name would appear when your name came up." (SA-App.73, R.119:172.)

CONCLUSION

Relying on the proximity of advertising placements to justify Cannon's keyword internet advertising tactic misses the point. It is the method by which Cannon has secured its advertising placement — using the names of Habush and Rottier to intentionally capitalize on their reputational value for the purpose of getting Cannon's

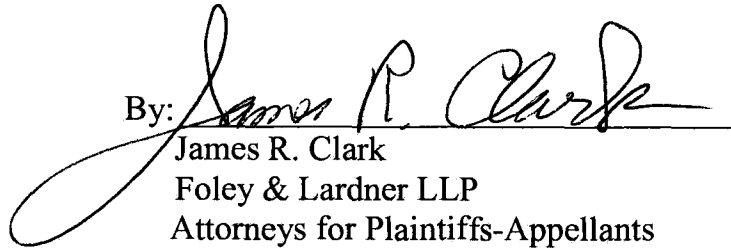
advertising in front of an audience they would not otherwise have access to — that makes this conduct violative of Section 995.50(2)(b).

The tension between the pervasiveness of the internet and individual privacy rights is becoming increasingly serious. Protecting the value associated with one's name is among the most cherished rights a person has. This use by Cannon of the names of Habush and Rottier crosses the line between an incidental or trivial one and one which seeks to take advantage of the reputation and other value associated with their names. It is this line which separates the reasonable use from the unreasonable, the use which violates Section 995.50(2)(b) from one that does not. It is a line which our courts should vigilantly enforce, regardless of whether the crossing takes place on the ever-evolving internet.

The circuit court's decision should be reversed, with instructions to enter judgment in favor of Habush and Rottier and to grant appropriate injunctive and other relief.

Dated this 8th day of February 2012.

Respectfully submitted,

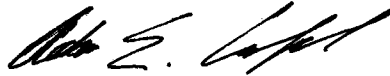
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FORM AND LENGTH CERTIFICATION

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 2,995 words.

Dated: February 8, 2012



Adam E. Crawford

**CERTIFICATE OF COMPLIANCE WITH
RULE 809.12**

I hereby certify that I have submitted an electronic copy of this Reply Brief, excluding the Supplemental Appendix, which complies with the requirements of § 809.19(12). I further certify that the electronic copy of the Reply Brief is identical in content and format to the printed form of the Reply Brief filed as of this date. A copy of this certificate has been served with the paper copies of this Reply Brief filed with the Court and served on all opposing parties.

Dated: February 8, 2012



Adam E. Crawford

CERTIFICATE OF MAILING

I hereby certify that ten copies of the Combined Reply Brief and Supplemental Appendix of Plaintiff-Appellant were deposited per our law office's regular procedures for Federal Express pick-up, for overnight delivery via Federal Express to the Clerk of the Court of Appeals, on February 8, 2012. I further certify that the Combined Reply Brief and Supplemental Appendix were correctly addressed and postage was pre-paid.

Dated: February 8, 2012



Adam E. Crawford

CERTIFICATE OF SERVICE

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

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