Appeal No. 2011AP1769 **Cir. Ct. No. 2009CV18149**

WISCONSIN COURT OF APPEALS
DISTRICT I

ROBERT L. HABUSH AND DANIEL A. ROTTIER,

PLAINTIFFS-APPELLANTS,

V.

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

DEFENDANTS-RESPONDENTS.

FILED

JUN 21, 2012

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2009-10),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUES

Personal injury attorneys Robert L. Habush and Daniel A. Rottier (plaintiffs) seek injunctive relief based on their claim that a second set of personal injury attorneys, who compete with the plaintiffs for legal business, purchased a form of Internet advertising from World Wide Web search engines that invaded the plaintiffs' right to privacy, in violation of WIS. STAT. § 995.50(2)(b). It is

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

undisputed that William M. Cannon, Patrick O. Dunphy, and their law firm, Cannon & Dunphy, S.C., (defendants), submitted successful bids to three search engines—Google, Yahoo!, and Bing—identifying "Habush" and "Rottier" as so-called "keywords" for the advertising benefit of the plaintiffs, and did so without having directly obtained written consent from either of the plaintiffs. The result of the defendants' successful bids was that, when anyone using one of these search engines entered either of these keywords as a search term, advertising for the defendants would appear at the top of the resulting search engine results page. Specifically, the advertising would appear in the form of a "sponsored" web page link for the defendants' law firm.

The circuit court dismissed the plaintiffs' action on summary judgment. Although the court concluded that the defendants' successful bid for the use of keywords constituted an invasion of the plaintiffs' privacy rights, the court further concluded that, beyond showing an invasion, a claimant under WIS. STAT. § 995.50(2)(b) must present evidence that the invasion is "unreasonable." Relying on a wide range of factors, the court concluded that the plaintiffs failed to offer proof upon which a jury could find that the defendants unreasonably invaded their privacy.

This case presents what we discern to be at least three major issues: (1) whether the practice described above constitutes an invasion of privacy under WIS. STAT. § 995.50(2)(b), assuming that the statute does not require that any such invasion be "unreasonable"; (2) if so, whether § 995.50(2)(b) requires as an element that such a privacy invasion be "unreasonable"; (3) if so, whether the

practice described above is "unreasonable" under the statute as a matter of law.[2] We conclude that this case is appropriate for certification because the issues presented here are novel and likely to have wide-ranging impact, because the supreme court has not interpreted § 995.50 in any context even generally resembling this one, and because the legislature has expressly directed in § 995.50(3) that the statute be "interpreted in accordance with the developing common law of privacy," presumably something the legislature anticipated would ultimately be done by the supreme court. We will discuss these reasons for certification in more detail below, but we first provide additional factual background and discussion of the parties' arguments on the main issues.

BACKGROUND

The parties stipulated before the circuit court, and the court agreed, that there are no material disputed facts. We agree, at least with respect to the issues we focus on.

As regular users of search engines know well, a computer user with access to the Internet may visit the website of a search engine, and on that site enter words or phrases that relate to a topic. The search engine then searches for information on the World Wide Web, and generates for the user a list of web page links related to this topic, from which the user selects one or more links of greatest interest by clicking on them. Web page links listed on a search engine results page

[2] The defendants also argue: that the named plaintiffs, as law firm shareholders, lack standing to pursue this action in their individual capacities; that the defendants' "truthful" "commercial speech" is lawyer marketing protected by the First Amendment; and that injunctive relief is not available to the plaintiffs because their own advertising practices leave them with "unclean hands." While one or more of these issues may also merit supreme court review, we focus on the issues most directly relating to WIS. STAT. § 995.50.

are termed "organic" if they are generated by the search engine without producing any advertising of the sort at issue in this case. In contrast, when the form of advertising at issue here is used, "sponsored" web page links appear above the "organic" results. In the words of the circuit court: "Each sponsored link has the look and feel of an organic result with slight background shading and the unobtrusive appearance of the small-text words: 'sponsored link,' 'sponsored result,' or 'ad.'"

As the circuit court further explained (footnotes omitted):

> Beginning in 2009, [the defendants] contracted with Google, Yahoo!, and Bing for a sponsored link to their law firm website to appear as the very first result, *above* organic results, in response to any user's input of certain search terms. Specifically, it purchased from Google the right to have the Cannon & Dunphy, S.C. link appear whenever the user would type either the word "Habush" or the word "Rottier" into the search engine. [The defendants] made similar arrangements with Yahoo! and Bing.
>
> The link that appears first in response to a search for the word "Habush" or the word "Rottier" is a link to the Cannon & Dunphy, S.C. website. Therefore, it might appear to an unsophisticated user that the Cannon & Dunphy, S.C. link is among the most relevant responses to a search for "Habush" or "Rottier."

In its successful bids, the defendants committed to pay the search engines a certain price for each user click on the defendants' sponsored link following a search using one of the keywords.[3]

[3] The circuit court drew the conclusion that the defendants were no longer using the sponsored links in the way challenged by the plaintiffs by the time the court addressed the summary judgment motions. However, as the circuit court noted, the case is not rendered moot because the plaintiffs seek an injunction not only to remove any such links but also barring any future use.

Turning to the statute at issue, as most relevant here, WIS. STAT. § 995.50 provides:

> **(1)** The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:
>
> (a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;
>
> (b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and
>
> (c) A reasonable amount for attorney fees.
>
> **(2)** In this section, "invasion of privacy" means any of the following:
>
> ….
>
> (b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.
>
> ….
>
> **(3)** The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

DISCUSSION

Invasion of Privacy

The plaintiffs argue that, by arranging for the search engines to drive consumers of legal services toward the defendants' web page using the plaintiffs' names, in the manner described above, the defendants have used the plaintiffs'

names for advertising purposes without their written consent. As stated above, the first major issue is whether the undisputed actions of the defendants constituted an invasion of privacy, without reaching the "unreasonable" element discussed separately below. Based on the language of the statute, the circuit court broke down the invasion of privacy claim into four components: (1) use; (2) for advertising purposes; (3) of the name of a living person; (4) without written consent of that person. If each is proven, an invasion of privacy is established.

Without reciting all of the circuit court's observations or all arguments of the parties, a primary argument of the defendants is that they did not "use" the plaintiffs' names. The gravamen of the defendants' argument is that only the Internet searchers actually "used" the names of the plaintiffs, in launching their independent and voluntary searches, and the challenged "sponsored" web page links of the defendants did not in any way reference the plaintiffs. The defendants' arguments rest in part on New York authority that apparently equates "use" with "display" in the context of a New York statute that the defendants submit parallels the Wisconsin statute. However, the defendants do not identify any Wisconsin authority to this effect.

On this point, the plaintiffs reply in part based on federal trademark law, which they argue is analogous, and which the plaintiffs assert holds that when, as here, an advertiser pays a search engine for each click to the advertiser's web page based on successful bids for triggering keywords, these are deemed "uses" of the keywords.

In a related vein, the defendants argue that all they purchased from the search engines was the right to have their advertisements displayed alongside "organic" search results from "Habush" or "Rottier" searches, and therefore they

cannot be said to have used the plaintiffs' names for advertising purposes. The defendants analogize this to a situation in which a business might buy space on a billboard that is located in close proximity to a billboard bearing a competitor's ad, which would not ordinarily be considered a "use" of the competitor's name.

The plaintiffs reply, in part, that the plain meaning of the terms "use" and "for advertising purposes" readily apply to the processes used by the search engines for which the defendants paid, and that the defendants made an obviously exploitive use of their names and reputations that goes to the heart of the purpose of WIS. STAT. § 995.50(2)(b). As for the defendants' adjacent advertising space argument, the plaintiffs rely in part on federal trademark law, which they submit undermines the defendants' argument.

The defendants also argue that the plaintiffs in fact consented in writing to the use of their names in the challenged manner by allegedly entering into their own, separate agreements with the search engines. However, it appears to us that the circuit court correctly interpreted both the agreements at issue and the meaning of "without ... written consent" in WIS. STAT. § 995.50(2)(b) to conclude that the plaintiffs did not consent in writing in a manner recognized under the statute.

"Unreasonable" As An Element

The parties present what each submits is a plain meaning interpretation of the following sentence in WIS. STAT. § 995.50(1) and the two interpretations conflict with each other: "One whose privacy is unreasonably invaded is entitled to the following relief." The plaintiffs argue that use of the phrase "unreasonably invaded" is intended only as a generic, introductory description, or placeholder, for the four specific forms or modes of privacy

invasion particularly described at § 995.50(2)(a)-(d), and therefore there is no "unreasonableness" element for a violation of § 995.50(2)(b), the provision at issue in this case. The plaintiffs point out that the other three forms of invasion include their own explicit "unreasonable" standards, and it would make little sense for there to be an additional level of "unreasonable" for those forms, while § 995.50(2)(b) stands out as a form of invasion for which the legislature omitted any requirement of a separate "unreasonableness" element. Under this view, the legislature was simply indicating that the elements expressly set forth in § 995.50(2)(b), if proven, necessarily show that the invasion is an unreasonable one.

The defendants argue that this approach would violate the rule against treating legislative language as surplusage as well as the rule against reading portions of a statute in isolation from each other. Instead, the defendants argue, the plain meaning of WIS. STAT. § 995.50(1), when read in context, is that, to be viable, all claims under § 995.50 must include proof of an "unreasonable" invasion of privacy. As referenced above, the circuit court agreed with this interpretation.

The defendants also cite one of the few Wisconsin Supreme Court opinions to reference WIS. STAT. § 995.50 (under its current or its former statute number, WIS. STAT. § 895.50 (2003-04)), which summarized "the right" at issue in that section as being "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) (referencing WIS. STAT. § 895.50 (2003-04)) and citing Prosser, *Privacy*, 48 CALIF. L. REV. 383, 384-88 (1960)). However, as the plaintiffs point out in reply, ***Zinda*** involved a claim under the subsection that has been

renumbered § 995.50(2)(c), which has its own explicit "unreasonable" element, not § 995.50(2)(b), and in addition the court in ***Zinda*** did not describe § 995.50 as having a general "unreasonable" element for all subsections.

If Privacy Invasion, "Unreasonable" Invasion

The third major issue would be reached in the event that the court determines that there was a privacy invasion in this case and that WIS. STAT. § 995.50(2)(b) contains an "unreasonable" element as a result of the language in § 995.50(1). That issue is whether the alleged privacy invasion here was unreasonable as a matter of law based on the undisputed facts.

The circuit court's discussion on this question ranged broadly, touching on: historic methods of competition both generally (such as when businesses in the same trade cluster together, sometimes into tight geographic districts) and within the legal profession (where attorneys and firms could historically obtain priority positions in telephone directories and the like by paying premiums); the degree to which the individual reputations of law firm shareholders Habush and Rottier may have become subsumed within the general reputation of their multi-attorney, heavily advertised law firm (which is not a "living person" with its own right of publicity); the lack of proof of actual confusion by Internet searchers; the potential impracticality of an injunction, given the fluid and ever-changing nature of Internet usages and search engine methodologies; the lack of references to Habush or Rottier on the defendants' sponsored link; and the lack of apparent attempts to enforce trademark or attorney ethical standards in this area.

The plaintiffs challenge virtually all of the premises of the court's analysis, some of which raise fundamental questions about the reasonable and

ordinary understandings and expectations of search engine users regarding "sponsored" web links as compared to "organic" results.

In arguing against the circuit court's conclusion that the defendants' conduct was not "unreasonable," the plaintiffs also cite a Wisconsin Supreme Court opinion for general propositions that: (1) Wisconsin common law "has consistently recognized a public policy interest in protecting the personal privacy and reputations of citizens," and (2) the privacy statute is one of "[s]everal sections of the Wisconsin Statutes [that] evince a specific legislative intent to protect privacy and reputation." ***Woznicki v. Erickson***, 202 Wis. 2d 178, 185, 187, 549 N.W.2d 699 (1996) (referencing WIS. STAT. § 895.50 (1993-94)). However, these general observations appear to provide little specific guidance here.

Factors Favoring Certification

With that background, as summarized above, we conclude that at least four factors make this case a significant and novel one that is appropriate for consideration by the supreme court.

The first factor is that it appears that the Wisconsin Supreme Court has not yet interpreted WIS. STAT. § 995.50 in any context even generally resembling this one, much less addressed specific features of § 995.50(2)(b) in the context of now pervasive Internet search engines.[4] Wisconsin was apparently one

[4] In ***Hirsch v. S.C. Johnson & Son, Inc***., 90 Wis. 2d 379, 386-87, 280 N.W.2d 129 (1979), the court held that use by defendant of the name "Crazylegs" on a shaving gel for women violated plaintiff's common law right of publicity, but the court explicitly noted that WIS. STAT. § 895.50(2)(b) (2003-04) (as noted below, renumbered WIS. STAT. 995.50 in 2006) had been enacted after the challenged product was taken off the market, and the only question presented in that case was whether plaintiff had a cause of action under the common law.

of the last jurisdictions in the nation to adopt a statutory right to privacy, *see* Judith Endejan, *The Tort of Misappropriation of Name or Likeness Under Wisconsin's New Privacy Law*, 1978 WIS. L. REV. 1029, 1029-30, and, for whatever set of reasons, the statute enacted in 1977 has not been the topic of extensive litigation reaching the supreme court.[5] As a result, both parties primarily cite as persuasive authority opinions from federal courts, from other state courts, or from such authorities as the RESTATEMENT (THIRD) OF UNFAIR COMPETITION, but without necessarily demonstrating that any of this persuasive authority is relevant to an interpretation of the meaning of § 995.50.[6]

The second factor is that until recently, the following activity did not exist: keyword-triggered advertising that uses "sponsored" web page links to draw the potential attention of millions of Internet users who navigate from search-engine results to web pages. The circuit court observed in this case that all of the authorities that the defendants cited to the court, at least on one issue, "were published decades before Google was created" in 1998. "[A]s Justice Cardozo once noted, major technological changes often call for the transformation of law." Greg Lastowka, *Google's Law*, 73 BROOK. L. REV. 1327, 1329 (2008) (citation omitted). While the facts are not in dispute, the parties present sharply different ways of characterizing the legal significance and meaning of Internet search results generated by an advertiser who has paid for that form of public exposure. We do not doubt that, as a general proposition, privacy may be invaded using

[5] The statute was enacted in 1977 as WIS. STAT. § 895.50, but was renumbered WIS. STAT. § 995.50 by 2005 Wis. Act 155, § 51, eff. April 5, 2006.

[6] The plaintiffs observe that this case "appears to be one of first impression in the United States courts." They point as persuasive authority to a decision of an Israeli court, offering the opinion in both its original Hebrew and an English translation.

online information, including by uses that ultimately rely on the complex, proprietary algorithms that produce search results. However, the parties do not call our attention to Wisconsin precedent addressing anything even remotely resembling this factual context. Moreover, as suggested above, the best legal pathway in this new context is all the less certain in light of limited supreme court precedent regarding the meaning of terms in WIS. STAT. § 995.50.

The third factor is the presence of the following provision in WIS. STAT. § 995.50(3) (emphasis added): "The right of privacy recognized in this section *shall be interpreted in accordance with the developing common law of privacy*, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media." "Developing" a "common law of privacy" is not the primary function of the court of appeals.

As a fourth factor, we note that any decision on these issues may have widespread and significant ramifications for many individuals and businesses in Wisconsin and beyond its borders. So far as we can determine from the briefs, the legal issues presented are not necessarily limited to the narrow question of whether competing law firms may bid, without prior written consent, for search engine use of the names of each other's principals, as occurred here. The effects of any decision will be substantial in an age when going business concerns of many types and sizes need to have a web presence and the purchase of search terms for "sponsored hits" is apparently commonplace. It has been said: "fortunes are won and lost based on Google's results pages." Lastowka, *supra*, at 1328.

In sum, we believe that the interpretation of WIS. STAT § 995.50 generally, and specifically § 995.50(2)(b), in this novel context with wide-ranging

impact raises potentially recurring and significant questions of statewide importance whose resolution requires development of the law. Thus, it is an appropriate candidate for certification to the Wisconsin Supreme Court.