
IN THE SUPREME COURT OF THE STATE OF MARSHALL

Edna Arbeiter,)	
)	
Plaintiff-Appellant,)	
)	
--v--)	No. 2000-135
)	
EmployExpert.com,)	
)	
Defendant-Appellee.)	
)	

RECORD ON APPEAL

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IN THE FIRST DISTRICT COURT OF APPEALS
OF THE STATE OF MARSHALL

Edna Arbeiter,)	
)	
Plaintiff-Appellant,)	
)	
--v--)	No. 2000-CV-2365
)	
EmployExpert.com,)	
)	
Defendant-Appellee.)	
)	

OPINION AND ORDER

RAMENAUR, Presiding Judge:

This is an appeal from the Order of the Madison County Circuit Court, granting summary judgment in favor of defendant EmployExpert.com in case number 2000-CV-2365.

In reviewing a grant of summary judgment, this Court applies the same test utilized by the trial court: the evidence must demonstrate the absence of any genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Marshall Rule Civ. P. 56(C).

Applying this standard to the record on appeal, we affirm the Circuit Court's holding and affirm summary judgment in favor of Defendant-Appellee.

Appellant has raised two separate assignments of error. First, Appellant argues the Circuit Court erred in holding that the personal information about her, and disseminated by Appellee, did not constitute an invasion of her privacy as defined by the Restatement (Second) of Torts governing the public disclosure of private facts. In addition, Appellant urges the Circuit Court erred in holding that Appellee's use of cookie technology to gather this information was not an invasion of her privacy.

RELEVANT FACTS

Neither party disputes the following facts: EmployExpert.com is a commercial web site offering consumers assistance with various employment matters. More specifically, EmployExpert.com answers questions submitted by its users who are searching for jobs and preparing for interviews. In addition, the web site facilitates the on-line presentation of its users' resumes. By registering with EmployExpert.com, users submit information to create a "profile." The submitted information is presented as a resume but with personal identifying information, such as the person's name, address, and phone number, redacted. In addition, EmployExpert.com redacts the locations of its users' past employment and other information that might

identify a user. Upon completing the registration process, EmployExpert.com assigns each user profile an ID code number which is used as a reference locator.

EmployExpert.com provides the described services without charge to its users. EmployExpert.com receives its revenue from the firms that place banner advertisements shown as visitors review the directory of completed profiles.

Each user receives an e-mail message summarizing the information provided by the user and containing a unique profile ID code number. The resume profiles are readily available to anyone who visits the web site, although visitors are asked for their name, e-mail address, and company name before they can view the profiles. The company name, and in some instances the user's e-mail address, are used by EmployExpert.com to filter its search results in order to prevent an employer from gaining access to its own employees' profiles.

EmployExpert.com gathers its information by asking users to submit information through an interactive web page application form. The form asks for a user's name, address, phone and e-mail. It states that this contact information will not be displayed to others so as to protect the privacy of the individual. The page also

requests the individual's age, sex, current and past employment information, and information related to the position that the individual is seeking.

At the end of the form is a section labeled "Privacy Preferences." In this section there are two statements, each of which appears next to a checkbox marked "I agree." The boxes are pre-checked, although the user can uncheck either or both boxes in order to avoid selecting the default responses. The first statement says, "In exchange for the services provided to me by EmployExpert.com, I understand that banner advertisements may appear on the same screen as my profile when it is accessed. I understand that EmployExpert.com may share non-personally identifiable information with third parties in connection with the banner advertisements, and is not responsible for the practices of such parties." The second statement says, "I allow EmployExpert.com to use any additional information, including information gathered by the analysis of cookie technology, to create and add an 'Interests' section to my resume profile. I understand that EmployExpert.com is not responsible for any misunderstanding or inconsistencies provided in this profile."

Edna Arbeiter, an employee of Arbor Shoes, used EmployExpert.com's services to create a resume profile so that she might find another job. She completed the entire application. She did not understand what "cookie technology" was, but felt it was important to include a section in her profile for "Interests," so she did not uncheck either of the selections under "Privacy Preferences." EmployExpert.com sent Arbeiter an e-mail message providing her ID code number and summarizing the information that she had submitted. See Appendix A.

Arbeiter's immediate supervisor at Arbor Shoes was Bill Simpson. Shortly after EmployExpert.com posted Arbeiter's profile to its site, Simpson happened to hit on the EmployExpert.com web site while using his home AOL account, and reviewed Arbeiter's profile. This apparently was possible because Simpson was using his personal account on America Online, rather than one provided by Arbor Shoes, and he did not give the company name when he registered with the site.

Although no personal information was visible on the profile page, Simpson believed the profile belonged to Arbeiter because he was familiar with her past employment history and education. On Monday, he called Arbeiter into

his office and informed her that because she was obviously looking for another job, she was fired.

After her termination, Edna Arbeiter visited EmployExpert.com to examine her resume profile as it appeared on the site. She saw that EmployExpert.com had added a section entitled "Interests." This section contained information that she did not recognize. In particular, it stated, "This individual is an active and experienced Internet user who spends several hours per day accessing the web. Among the web sites frequently visited by this individual are news and information sites, sports sites, employment and finance sites, and weather information sites." See Appendix B.

Arbeiter sued EmployExpert.com claiming invasion of privacy since she neither consented to nor specifically gave EmployExpert.com any of the information contained in the section entitled "Interests." She claimed that EmployExpert.com's portrayal of her via the profile had allowed her current employer to identify her, thus resulting in her termination.

Arbeiter argued that any person familiar with her history could easily identify her by the information contained in the profile. She now asserts that EmployExpert.com invaded her privacy because it displayed

information to which she did not consent and as a result, her employer was able to identify her due to private information displayed in the profile.

ANALYSIS

A. Invasion of Privacy by Public Disclosure of Private Facts

The State of Marshall recognizes that in order for there to be any invasion of privacy, the information must itself be private. The State of Marshall adheres to the rules set forth in the Restatement (Second) of Torts, explaining the elements necessary for a public disclosure of private facts. Therefore, the public matter disclosed must be "highly offensive to a reasonable person," and one that "is not of legitimate concern to the public."

Restatement (Second) of Torts § 652D (1977).

In the case at bar, Edna Arbeiter had knowledge of the fact that the information she provided would be made available to the public in some form. The fact that she volunteered this information in a public forum, such as the Internet, relinquishes her right to any claim of privacy. In addition, this information is in no way offensive. Accordingly, Appellant did not meet the elements set forth in the Restatement.

Moreover, Appellee maintains a clearly posted privacy policy, available to all individuals who visit its site, specifically disclaiming responsibility for any actions that occur as a result of an individual utilizing the site. Notwithstanding, Arbeiter voluntarily provided personal data to EmployExpert.com which, in turn, posted this information on the site. Appellant thus proceeded to use the site to her own peril. Accordingly, the first assignment of error is denied.

B. Intrusion upon Seclusion through Cookie Technology

The State of Marshall recognizes the theory of intrusion upon seclusion, adhering to the rule that for an intrusion upon seclusion to occur, a plaintiff must show that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.

Appellant now asks this Court to recognize "net surfing" as a protected zone of privacy. We disagree with this premise and decline to expand the zone of privacy, as contemplated by the theory of intrusion upon seclusion, to include net surfing activities. Appellee's use of cookies did not penetrate a zone of physical or sensory privacy surrounding Appellant. Rather, Appellant willingly browsed

through the Internet, which we recognize to be a public domain. We refuse to broaden the zone of privacy to include an area where the public clearly frequents.

We further disagree with Appellant's argument that EmployExpert.com's unwanted access to her data constitutes an intrusion upon seclusion. EmployExpert.com did not gain unwanted access to data about Appellant. Moreover, the data obtained by EmployExpert.com is not highly sensitive information afforded greater protection under privacy laws, since it is clearly not of a financial, sexual, or medical nature. Accordingly, we find that the use of cookie technology is not an intrusion upon seclusion.

Appellant's claim of an invasion of privacy is unfounded since the information itself should not be considered private. For this reason, Appellee's use of cookie technology is not an invasion of privacy and Appellant's second assignment of error is also denied.

CONCLUSION

For all of the reasons set forth herein, both of Appellant's assignments of error are denied and the Circuit Court's Order granting summary judgment in favor of Defendant-Appellee EmployExpert.com is hereby AFFIRMED.

APPENDIX A

EmployExpert.com Profile Application

You provided the following information in the application that you completed at our web site. Please return to our site if you wish to make any revisions or corrections to this information. Your profile ID code number is 0992. You will need that number and the password that you selected in order to change this information. Please contact us at webmaster@employexpert.com if you have forgotten your password or if you have any other questions. Thank you for using EmployExpert.com!

CONFIDENTIAL PERSONAL PROFILE

(None of the following information will be made available without your specific authorization.)

Name: Edna Arbeiter

Street Address: 1356 W. Roscoe

City: Springfield **State:** Marshall **Zip Code:** 60690

Phone Number: 312-427-2737 **E-mail Address:** Arbeiter@marshallonline.com

GENERAL PROFILE

(Some or all of the following information will be available to persons who visit our site.)

Age: 43 **Sex:** F **Geographic Area:** Midwest

Education:

Institution: Marshall State University

Degree: B.A. **Date:** 1979

Field/Major: Communications

Current employment:

(This information is vital to assist us in blocking your current employer from viewing your profile. Your current salary will not appear with your profile, but employers who visit our site may search for candidates with current or desired salaries within a particular range.)

Company: Arbor Shoes

City: Springfield **State:** Marshall

Duration: 1996 to present

Title: Regional Sales Manager

Salary: \$45,000

Accomplishments: Increased sales, doubled representatives' sales, suggested new product ideas.

Previous employment:

- (1) **Company:** LitWare, Inc.
City: Humboldt **State:** Marshall
Duration: 1979-1987
Title: Senior Sales Representative
Accomplishments: Increased sales revenue, expanded sales teams, suggested and selected new products.
- (2) **Company:** Ferguson and Bardell
City: Horner **State:** Marshall
Duration: 1987-1996
Title: District Sales Manager
Accomplishments: Increased regional sales, managed 250 sales representatives in 10 states, trained all new recruits.

Position Sought:

Desired Job Title: Sales Manager
Desired Salary: \$60,000
Objectives: Continue working to increase sales with new company and become more involved with the implementation of product ideas.
Geographical/Other Restrictions: None

PRIVACY PREFERENCES

(You may visit our site at any time to change your preferences, but be aware that limiting the information that may be gathered by or made available through EmployExpert.com may reduce the number of potential employers that view your profile. For more information, please see the Privacy Policy Statement on web site.)

I agree In exchange for the services provided to me by EmployExpert.com, I understand that banner advertisements may appear on the same screen as my profile when it is accessed. I understand that EmployExpert.com may share non-personally identifiable information with third parties in connection with the banner advertisements, and is not responsible for the practices of such parties.

I agree I allow EmployExpert.com to use any additional information, including information gathered by the analysis of cookie technology, to create and add an "Interests" section to my resume profile. I understand that EmployExpert.com is not responsible for any misunderstanding or inconsistencies provided in this profile.

APPENDIX B

Profile No. 0992

Position Sought	National Sales Manager
Objective	Continue working to increase sales with new company and become more involved with the implementation of product ideas.
Experience	<p>Regional Sales Manager (4 years)</p> <ul style="list-style-type: none">• Increased sales, doubled representatives' sales, suggested new product ideas <p>District Sales Manager (9 years)</p> <ul style="list-style-type: none">• Increased regional sales, managed 250 sales representatives in 10 states, trained all new recruits <p>Senior Sales Representative (8 years)</p> <ul style="list-style-type: none">• Increased sales revenue, expanded sales teams, suggested and selected new products
Education	<ul style="list-style-type: none">• B.A., Communications
Interests	This individual is an active and experienced Internet user who spends several hours per day accessing the web. Among the web sites frequently visited by this individual are news and information sites, sports sites, employment and finance sites, and weather information sites.

APPENDIX C

EmployExpert.com Privacy Policy Statement

EmployExpert.com is strongly committed to protecting the privacy of all visitors that post personal information on this site. We understand the sensitivity of one who is seeking a job and wants to provide a trustworthy and safe environment. This statement is meant to explain to you, the visitor, the actions we implement to maintain your safety.

All personal information that EmployExpert.com collects is gained on a voluntary basis. The contact information that we collect is necessary so that we can contact particular visitors in regards to their profile. Personal contact information is omitted from profiles created by EmployExpert.com to maintain the privacy of visitors; contact information will be provided to a particular employer only with your specific authorization.

In addition, we do not sell or display personal information to anyone unless required to do so by law or to protect the rights and property of others. This site contains links to other sites as well as banner ads. EmployExpert.com is not responsible for the practices or content of such sites. Therefore, all users should know that when they voluntarily provide personal information, the data can be collected by others.

Our site uses cookie technology to optimize service to our visitors. These cookies allow us to recognize repeat visitors and make our site more productive and personalized. If you configure your web browser to disable cookies, you may not be able to take advantage of all of the features of EmployExpert.com.

If you have any questions or comments regarding our site, please feel free to contact us at webmaster@employexpert.com.

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ORDER GRANTING LEAVE TO APPEAL

The Supreme Court of the State of Marshall hereby grants Plaintiff Edna Arbeiter leave to appeal the decision of the First District Court of Appeals in Case Number 2000-CV-2365, which affirmed the Circuit Court's decision in favor of Defendant EmployExpert.com.

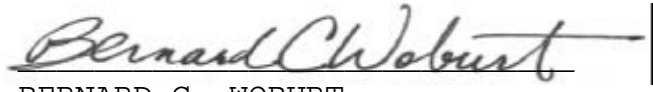
On appeal, the parties shall address the following issues:

- (1) Did the Court of Appeals err in holding that the information disseminated by Defendant EmployExpert.com was neither private, nor invaded the Plaintiff's privacy as defined by applicable state law analogous to the Restatement (Second) of Torts regarding the public disclosure of private facts; and

(2) Did the Court of Appeals err in holding that use of cookie technology to gather personal information is not an invasion of privacy?

Pursuant to stipulation of the parties, the Opinion and Order of the Court of Appeals shall serve as the Record on Appeal herein.

Dated: July 28, 2000


BERNARD C. WOBURT
Chief Justice