
IN THE SUPREME COURT OF THE STATE OF MARSHALL

Allen Sanders,)	
)	
Plaintiff-Appellant,)	
)	
--v--)	No. 2001-1224
)	
Marshall Manatees, Inc.,)	
)	
Defendant-Appellee.)	
)	

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

Allen Sanders,)	
)	
Plaintiff-Appellant,)	
)	
--v--)	No. 2001-CV-0901
)	
Marshall Manatees, Inc.,)	
)	
Defendant-Appellee.)	
)	

OPINION AND ORDER

A.L. SIER, Presiding Judge:

This is an appeal from the Order of the Madison County Circuit Court, granting summary judgment in favor of defendant Marshall Manatees in case number MCV-01-1040.

In reviewing a grant of summary judgment, this Court applies the same test utilized by the trial court: the evidence must demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to a 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 the Defendant-Appellee.

Appellant has raised two separate assignments of error. First, Appellant argues the Circuit Court erred in granting summary judgment on Appellant's claim that Appellee invaded Appellant's privacy by placing Appellant in a false light. And second, Appellant argues that the Circuit Court erred in granting summary judgment on Appellant's claim that Appellee misappropriated Appellant's name and likeness for commercial purposes.

RELEVANT FACTS

Neither party disputes the following facts:

Appellant attended a professional basketball game of the Marshall Manatees on January 23, 2001. On January 23, the Manatees played the Calizona Ducks, a team from the West Coast. Both teams had a good season so the game was nationally televised and sold out. The game took place at the Manatees' Marshall Center stadium in Marshall City. Appellant purchased his ticket online using a credit card one month prior to the game, and received the ticket in the mail about two weeks later. The ticket has a bar code on its face for security and authentication purposes, and a

waiver in small type on the back. The waiver states the following:

This ticket is a revocable license and may be taken and admission refused upon refunding the purchase price appearing hereon. The resale or attempted resale at a price higher than that appearing hereon is grounds for seizure and cancellation without compensation. Holder of this ticket voluntarily assumes all risks and danger incidental to the game or event for which this ticket is issued. Holder agrees by use of this ticket not to transmit or aid in transmitting any description, account, picture or reproduction of the game or event to which this ticket is issued. Breach of the foregoing will automatically terminate this license. Holder grants permission to organization sponsoring the game or event for which this ticket is issued to utilize the holder's image or likeness in connection with any video or other transmission or reproduction of the event for which this ticket relates.

The Marshall Manatees are a privately owned basketball team that supports a variety of charities. One such charity is the Find Lost Kids Foundation (FLK), an independent charitable organization with the objective of locating missing and abducted children. To show its support for the Marshall community and charities like FLK, the Manatees started a community service project called "Manatees Care." The project's goals are to raise public awareness of the problem of abducted children, promote FLK's activities, help raise money for FLK, and serve as a public relations vehicle for the Manatees.

The Manatees maintain a web site at www.marshallmanatees.com. Information about the "Manatees Care" project is prominently displayed on the web site's home page, along with hyperlinks to the web sites of FLK and other organizations.

FLK maintains an extensive web site at www.findlostkids.org. The site features information about the organization and a number of resources for finding lost and abducted children. One of these resources is a searchable online database of photographs of abducted children and their alleged abductors.

FLK obtains the images and other information used in its database from a variety of sources, including family and friends of the abducted children, public and private schools, law enforcement agencies, children's charities, and religious groups.

The Manatees promote the "Manatees Care" service project and the team's affiliation with FLK in other ways as well. For example, placards in buses and trains as well as billboards containing both the Manatees' and FLK's logos are found throughout Marshall City. In addition, large posters describing the service project are displayed throughout the Marshall Center.

Upon entering the Marshall Center, patrons must insert their tickets into an automated turnstile ticket reader. The turnstile allows an individual patron to enter only after reading the bar code on his or her ticket. The ticket information is stored in the Manatees' customer database. While the bar code is being processed, security cameras photograph each patron. This camera provides a clear image of each patron's face. The image is then digitized and stored (along with the ticket's bar code information) in the Manatees' customer database. This database is used for a variety of purposes, including marketing research, in-house security, and internal promotions. In addition, the Manatees license the database to a variety of entities including local law enforcement, national marketing companies, FLK, and other charities.

The Manatees also use the customer database as part of the "Manatees Care" service project. In an effort to help FLK identify and locate abducted children and their abductors, the team regularly runs a comparison between its customer database and FLK's online database. FLK has a cross-licensing agreement that permits its images and files to be compared with those obtained by the Manatees.

The Manatees employ a comparison technology called facial recognition technology. Facial recognition

technology is a relatively new form of biometrics that was first brought to the public's attention at Super Bowl XXXV. This form of biometrics varies depending on the hardware and the software that is used.

The first step in the process used at the Marshall Center is to take a picture of an individual's face. Next, the system takes that image and converts it into a digital file. The digital photograph is then tagged with approximately eighty measurable reference points, each of which represents a physical feature of the person's face. For example, the points assigned to the individual's face will mark the size of the eyes and the distance between the centers of the eyes. Although many people may have a similar measurement, the combination of eighty reference points makes every person unique.

After a person's face is converted to a digital file and marked with reference points, the file is then transferred to a database where it can be compared to other digital files. The Marshall Center's system is able to compare tens of thousands of files every minute with extreme accuracy. The computer only has to match fourteen out of the eighty unique reference points to make a positive identification. Similar technology that is used

in casinos and by law enforcement agencies is 99.3 percent accurate.

The technology allows the Marshall Center to compare the entire crowd at any given event with other databases in less time than it would take to complete one quarter of a basketball game.

On January 23, 2001, Sanders was photographed as he entered the Marshall Center, and his image was added to the Manatees' customer database. Approximately one hour later, the patrons' images that had been entered into the customer database that evening were automatically compared to those in FLK's database. Upon processing all of the images, the system indicated a match linking Sanders' digital photo to one of an abductor maintained in FLK's database.

The technician responsible for running the program then visually compared the two images to ensure accuracy. Concluding that both images demonstrated a man of approximately the same height, weight, eye and hair color, the technician notified the Manatees' community service project director of a match. The project director immediately contacted FLK and the Manatees' PR department.

Three days later, the Manatees erected a billboard on one of the three major interstate highways that led into Marshall City. The billboard displayed two pictures of

Allen Sanders, the image from the Manatees' customer database and the image from the FLK database. The Manatees' mascot separated the two pictures. Above the photo, a statement read, "5200 KIDS WERE ABDUCTED LAST YEAR - HAVE YOU SEEN THIS MAN?" Underneath the photo a statement read, "MARSHALL'S MANATEES CARE ABOUT CHILDREN. IF YOU HAVE ANY INFORMATION ABOUT THIS MAN PLEASE CONTACT US AT 1-844-MMCARE OR VISIT US ON THE WEB AT WWW.MARSHALLMANATEES.COM." In the corner of the billboard a statement read, "SPONSORED BY MANATEES CARE - A COMMUNITY SERVICE PROJECT OF THE MARSHALL MANATEES."

Although Allen Sanders' photo was contained in the FLK's abductors database, he has never been convicted of kidnapping. His picture is in the database because he was married to LeAnna Tuceo, who after losing custody of her kids abducted them from their custodial father.

Sanders had nothing to do with the abduction of Tuceo's children. In the summer of 2000, Sanders and Tuceo planned to take her children on a vacation to Dawson's Water Park in downstate Marshall. However, the day they were to leave on their trip, Sanders had an unexpected work-related emergency. Tuceo left as planned. Sanders was to meet her the following day. However, when Sanders arrived at the hotel, Tuceo was not to be found. She

telephoned him later that day, informing him that she had taken the children out of state without their father's consent or knowledge. Sanders immediately contacted the children's father and explained what happened. Sanders has not spoken to Tuceo since then.

Nevertheless, after the billboard was posted, Sanders began to receive phone calls and threatening notes from people believing that he was an abductor. Sanders' church group ostracized him and refuses to allow him to participate in its weekly prayer group.

In addition, Sanders owns a prominent advertising agency and many of his clients are no longer returning his calls. Some of them have told him that they refuse to work with a person who abducts children. Due to all of this emotional distress, Sanders is currently seeing a doctor, he cannot sleep at night, and he is deeply emotionally disturbed.

Sanders filed a two-count lawsuit against the Manatees. First, he accused the Manatees of false light invasion of privacy for placing his photo on the billboard, thereby causing others to believe he was a child abductor. His second claim was for invasion of privacy by misappropriation of his likeness for commercial purposes,

based upon the manner in which the Manatees used his photograph.

ANALYSIS

A. Invasion of Privacy: False Light

The State of Marshall has enacted a statute that follows the Restatement (Second) of Torts governing claims for invasion of privacy by placing another in a false light. The applicable section provides:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Marshall Revised Code § 652(E).

In the case at bar, there is no indication from the Record that the Marshall Manatees had knowledge as to the falsity of the publicized matter. Moreover, there is no evidence to suggest the Manatees acted in reckless disregard or with malice when it captured Appellant's photo, when it compared the photo with those stored in the

FLK database, or when it ultimately posted Appellant's image on its billboard. Furthermore, the text of Appellee's advertisement did not label Appellant as a child abductor. We decline to find the message as one that a reasonable person would find highly offensive. Based on this analysis, Appellant does not establish the necessary elements for his claim of false light invasion of privacy, and his first assignment of error is denied.

B. Appropriation of Name and Likeness

For his second assignment of error, Appellant has asked the Court to rule as a matter of fact and law that the Marshall Manatees invaded his privacy through its misappropriation of his name and likeness. The applicable law in the State of Marshall is similar to that which is set forth in the Restatement (Second) of Torts. The relevant portion of the statute provides:

One who appropriates to his own use or benefit for commercial purposes, the name, image or likeness of another is subject to liability to the other for invasion of his privacy.

Marshall Revised Code § 652(C).

Therefore, to prevail on his misappropriation claim in Marshall, Appellant must not only demonstrate that his name or likeness was used without consent, but also that such

use was for commercial purposes. Likewise, if Appellee can show consent to the appropriation or that the use was not commercial in nature, the claim must fail.

In the case at bar, Appellant voluntarily entered the Manatees' Marshall Center, a public place where television cameras and other imaging equipment are regularly operated in plain open view. Appellant could not reasonably have expected to be on the premises without some likelihood that his image might be recorded.

Appellant further argues that the Marshall Manatees used his image for its own commercial purposes without his permission. This Court rejects Appellant's argument based on the express waiver contained on the reverse side of the ticket.

A waiver, commonly called an exculpatory contract clause, must contain the following elements to be valid. The clause must be clear and understandable, and must relate to an interest that a knowledgeable party would know could be contracted away. Marshall courts accept the majority view that contractual waivers, like other contracts of adhesion, are to be strictly construed against the drafter. In addition, they are enforceable only where the intent of the waiver is clear and unambiguous.

Applying this standard, we find the Marshall Manatees secured the necessary consent both to photograph Appellant and to utilize his image. The reverse side of Appellant's admission ticket contained standard assumption of risk clauses as well as language granting the Manatees specific authorization to utilize his image or likeness. We find this language to be clear, understandable and unambiguous. The Appellant should have understood that by entering the Manatees' Marshall Center, Appellee had secured his express permission to disseminate any images of him it had captured. Accordingly, 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 Marshall Manatees is hereby AFFIRMED.

IN THE SUPREME COURT OF THE STATE OF MARSHALL

Allen Sanders,)	
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Plaintiff-Appellant,)	
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--v--)	No. 2001-1224
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Marshall Manatees, Inc.,)	
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Defendant-Appellee.)	
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ORDER GRANTING LEAVE TO APPEAL

The Supreme Court of the State of Marshall hereby grants Allen Sanders leave to appeal the decision of the First District Court of Appeals in Case Number 2001-CV-0901, which affirmed the Circuit Court's decision in favor of Marshall Manatees, Inc.


On appeal, the parties shall address the following issues:

- (1) Whether the Circuit Court erred in granting summary judgment on Sanders' claim of false light invasion of privacy; and
- (2) Whether the Circuit Court erred in granting summary judgment on Sanders' claim of

invasion of privacy by appropriation of name
or likeness.

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

Dated: August 1, 2001


BERNARD C. WOBURT
Chief Justice