

Lothar MOTSCHENBACHER, Plaintiff-Appellant,
v.
R. J. REYNOLDS TOBACCO COMPANY, a corporation, and William Esty Company,
Defendants-Appellees.

United States Court of Appeals, Ninth Circuit
No. 72-1419.

June 6, 1974.

KOELSCH, Circuit Judge:

Lothar Motschenbacher appeals from the district court's order granting summary judgment in favor of defendants in his suit seeking injunctive relief and damages for the alleged misappropriation of his name, likeness, personality, and endorsement in nationally televised advertising for Winston cigarettes. ***

The 'facts' on which the district court rendered summary judgment are substantially as follows:¹ Plaintiff Motschenbacher is a professional driver of racing cars, internationally known and recognized in racing circles and by racing fans. He derives part of his income from manufacturers of commercial products who pay him for endorsing their products.

During the relevant time span, plaintiff has consistently 'individualized' his cars to set them apart from those of other drivers and to make them more readily identifiable as his own. Since 1966, each of his cars has displayed a distinctive narrow white pinstripe appearing on no other car. This decoration has adorned the leading edges of the cars' bodies, which have uniformly been solid red. In addition, the white background for his racing number '11' has always been oval, in contrast to the circular backgrounds of all other cars.

In 1970, defendants, R. J. Reynolds Tobacco Company and William Esty Company, produced and caused to be televised a commercial which utilized a 'stock' color photograph depicting several racing cars on a racetrack. Plaintiff's car appears in the foreground [sic], and although plaintiff is the driver, his facial features are not visible.

In producing the commercial, defendants altered the photograph: they changed the numbers on all racing cars depicted, transforming plaintiff's number '11' into '71'; they 'attached' a wing-like device known as a 'spoiler' to plaintiff's car; they added the word 'Winston,' the name of their product, to that spoiler and removed advertisements for other products from the spoilers of other cars. However, they made no other changes, and the white pinstriping, the oval medallion, and the red color of plaintiff's car were retained. They then made a motion picture from the altered photograph, adding a series of comic

¹ We of course express no opinion regarding what facts the evidence may ultimately establish; we simply accept the statements of plaintiff's affiants as true for the purposes of the motion.

strip-type 'balloons' containing written messages of an advertising nature; one such balloon message, appearing to emanate from plaintiff, was: 'Did you know that Winston tastes good, like a cigarette should?' They also added a sound track consisting in part of voices coordinated with, and echoing, the written messages. The commercial was subsequently broadcast nationally on network television and in color.

Several of plaintiff's affiants who had seen the commercial on television had immediately recognized plaintiff's car and had inferred that it was sponsored by Winston cigarettes.

On these facts the district court, characterizing plaintiff's action as one 'for damages for invasion of privacy,' granted summary judgment for defendants, finding as a matter of law that

' . . . the driver of car No. 71 in the commercial (which was plaintiff's car No. 11 prior to said change of number and design) is anonymous; that is, (a) the person who is driving said car is unrecognizable and unidentified, and (b) a reasonable inference could not be drawn that he is, or could reasonably be understood to be plaintiff, Lothar Motschenbacher, or any other driver or person.'²

'Summary judgment of course is proper only where there is no genuine issue of any material fact or where viewing the evidence . . . in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law.' See Stansifer v. Chrysler Motors Corporation, 487 F.2d 59, 63 (9th Cir. 1973), and cases cited therein.

* * *

In California, as in the vast majority of jurisdictions, [footnote omitted] the invasion of an individual's right of privacy is an actionable tort. Melvin v. Reid, 112 Cal.App. 285, 297 P. 91 (1931). [footnote omitted] In 1960 Dean Prosser, drawing on over 300 cases, observed that the tort is actually a complex of four separate and distinct torts, each of which is decided under an 'invasion of privacy' label. See Prosser, Privacy, 48 Calif.L.Rev. 383 (1960); Prosser, Law of Torts 804 (4th ed. 1971). Prosser's four categories are: (1) intrusion upon the plaintiff's seclusion or solitude; (2) public disclosure of private facts; (3) placing the plaintiff in a false light in the public eye; and (4) appropriation, for defendant's advantage, of plaintiff's name or likeness. [footnote omitted] The case before us is of the fourth variety-commercial appropriation. [footnote omitted]

* * *

² The district court concluded:

'3. Not having been identified in the commercial either visually, aurally, explicitly, or inferentially, plaintiff's action fails, and the Court is authorized to grant defendants' Motion for Summary Judgment.'

It is true that the injury suffered from an appropriation of the attributes of one's identity⁹ may be 'mental and subjective'- in the nature of humiliation, embarrassment, and outrage. Fairfield, supra, at 86, 291 P.2d 194. However, where the identity appropriated has a commercial value,¹⁰ the injury may be largely, or even wholly, of an economic or material nature.¹¹ Such is the nature of the injury alleged by plaintiff.

Some courts have protected this 'commercial' aspect of an individual's interest in his own identity under a privacy theory. [citations omitted].

Others have sought to protect it under the rubric of 'property' or a so-called 'right of publicity.' [citations omitted].

Prosser synthesizes the approaches as follows:

'Although the element of protection of the plaintiff's personal feelings is obviously not to be ignored in such a case, the effect of the appropriation decisions is to recognize or create an exclusive right in the individual plaintiff to a species of trade name, his own, and a kind of trade mark in his likeness. It seems quite pointless to dispute over whether such a right is to be classified as 'property'; it is at least clearly proprietary in its nature. Once protected by the law, it is a right of value upon which the plaintiff can capitalize by selling licenses.'

Law of Torts (4th ed. 1971), at 807.

⁹ As Dean Prosser noted in his Law of Torts (4th ed. 1971), at 805-806:

'It is the plaintiff's name as a symbol of his identity that is involved here, and not as a mere name. Unless there is some tortious use made of it, there is no such thing as an exclusive right to the use of a name; and any one can be given or assume any name he likes. It is only when he makes use of the name to pirate the plaintiff's identity for some advantage of his own * * * that he becomes liable. It is in this sense that 'appropriation' must be understood.'

¹⁰ It would be wholly unrealistic to deny that a name, likeness, or other attribute of identity can have commercial value. As the court observed in Uhlaender v. Henricksen, 316 F.Supp. 1277 (D.Minn.1970), at 1283:

'A name is commercially valuable as an endorsement of a product or for financial gain only because the public recognizes it and attributes good will and feats of skill or accomplishments of one sort or another to that personality.'

See also notes 11 and 14, infra.

¹¹ Generally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered. However, it is quite possible that the appropriation of the identity of a celebrity may induce humiliation, embarrassment and mental distress, while the appropriation of the identity of a relatively unknown person may result in economic injury or may itself create economic value in what was previously valueless. In this latter context, [citations omitted].

So far as we can determine, California has no case in point; the state's appropriation cases uniformly appear to have involved only the 'injury to personal feelings' aspect of the tort. [footnote omitted] Nevertheless, from our review of the relevant authorities, we conclude that the California appellate courts would, in a case such as this one, afford legal protection to an individual's proprietary interest in his own identity. We need not decide whether they would do so under the rubric of 'privacy,'¹³ 'property,'¹⁴ or 'publicity'; [footnote omitted] we only determine that they would recognize such an interest and protect it. [footnote omitted]

We turn now to the question of 'identifiability.' Clearly, if the district court correctly determined as a matter of law that plaintiff is not identifiable in the commercial, then in no sense has plaintiff's identity been misappropriated nor his interest violated.

Having viewed a film of the commercial, we agree with the district court that the 'likeness' of plaintiff is itself unrecognizable; however, the court's further conclusion of law to the effect that the driver is not identifiable as plaintiff is erroneous in that it wholly fails to attribute proper significance to the distinctive decorations appearing on the car. As pointed out earlier, these markings were not only peculiar to the plaintiff's cars but

¹³ Two recent decisions, Williams v. Weisser, 273 Cal.App.2d 726, 78 Cal.Rptr. 542 (1969), and Stilson v. Reader's Digest Association, Inc., 28 Cal.App.3d 270, 104 Cal.Rptr. 581 (1972), suggest that a 'commercial' interest in one's identity may be protected in California under the 'privacy' rationale of Fairfield. In Weisser, a university professor brought suit for invasion of privacy and infringement of common law copyright when the defendant, without his consent, published student notes of plaintiff's classroom lectures under plaintiff's name. Plaintiff prevailed under both theories and was awarded compensatory damages based on a publisher's testimony of the commercial value of the notes. In Stilson, the court noted that 'if commercial exploitation be found, (plaintiffs) would be entitled to nominal recoveries upon little more than an election to proceed' and that 'each such plaintiff has an established right to show the mental anguish, as well as the financial detriment, which may have been caused to him by the use of his name in letters to * * * other persons. This * * * could well concern the status and business relationship to him of the recipients of the letters using his name.' 28 Cal.App.3d at 273-274, 104 Cal.Rptr. at 583.

¹⁴ The interest may likewise be protectable as 'property.' In Yuba River Power Co. v. Nevada Irrigation District, 207 Cal. 521, 523, 279 P. 128, 129 (1929), a water rights case, the California Supreme Court said in construing a statute: 'The term 'property' is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.' In Republic Pictures Corp. v. Rogers, 213 F.2d 662, 665-666 (9th Cir. 1954), this court interpreted California law in a somewhat different context, observing that reproductions of the 'name, voice and likeness' of a performer are valuable because of the notoriety of the performer and his great public following. And in a second appeal of Fairfield, supra, 158 Cal.App.2d 53, 56, 322 P.2d 93 (1958), relating to the question of damages, the California Court of Appeal recognized that the names of celebrities may have substantial commercial value. Accord, In Re Weingand, 231 Cal.App.2d 289, 293-294, 41 Cal.Rptr. 778 (1964).

they caused some persons to think the car in question was plaintiff's and to infer that the person driving the car was the plaintiff.¹⁷

Defendant's reliance on Branson v. Fawcett Publications, Inc., 124 F.Supp. 429 (E.D.Ill.1954), is misplaced. In Branson, a part-time racing driver brought suit for invasion of privacy when a photograph of his overturned racing car was printed in a magazine without his consent. In ruling that 'the photograph * * * does not identify the plaintiff to the public or any member thereof,' 124 F.Supp. at 433, the court said:

'[T]he automobile is pointed upward in the air and the picture shows primarily the bottom of the racer. The backdrop of the picture is not distinguishable. No likeness, face, image, form or silhouette of the plaintiff or of any person is shown. From all that appears from the picture itself, there is no one in the car. Moreover, no identifying marks or numbers on the car appear . . . Plaintiff does not even assert that the car he was driving was the same color as that which appears in the colored reproduction.'

124 F.Supp. at 432.

But in this case, the car under consideration clearly has a driver and displays several uniquely distinguishing features.

The judgment is vacated and the cause is remanded for further proceedings. [footnote omitted]

¹⁷ The addition of a 'Winston' spoiler to the plaintiff's car does not necessarily render the automobile impersonal, for plaintiff's cars have frequently used spoilers; it may be taken as contributing to the inference of sponsorship or endorsement. The alteration which may affect identifiability is the change in numbering, but this alteration does not preclude a finding of identifiability by the trier of fact.