

V I R G I N I A :

IN THE GENERAL DISTRICT COURT OF ARLINGTON COUNTY  
CIVIL DIVISION

RAM AVRAHAMI,

Plaintiff,

v.

Civil Action No. 95-7479

U.S. NEWS & WORLD REPORT, INC.,

Defendant.

PLAINTIFF MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Ram Avrahami, by counsel, pursuant to Rule 3:18 of the Rules of the Supreme Court of Virginia, and moves this Honorable Court for summary judgment against the Defendant, U.S. News and World Report, Inc., ("U.S. News") on the grounds as set forth herein.

This action was filed on July 21, 1995, seeking damages pursuant to Virginia Code 8.01-40 for the misappropriation by Defendant of Plaintiff's name and/or likeness. On or about October 24, 1995, Defendant U.S. News filed a Motion for Stay which was denied in open court on or about November 27, 1995. Plaintiff now moves for summary judgment on the following grounds: (1) Plaintiff's name and/or likeness was used by Defendant for the purposes of trade without having first obtained the written consent of Plaintiff in direct violation of Virginia Code Section 8.01-40(A); and (2) Defendant exercised dominion over Plaintiff's property by using his name and/or likeness for a commercial benefit without his permission.

STANDARD OF REVIEW

A summary judgment motion is proper in cases in which the only dispute concerns a pure question of law. General Accident Fire & Life Assurance Corp. v. Cohen, 203 Va. 810, 127 S.E.2nd 399 (1962).

The rule was adopted to permit trial courts to expedite litigation where it appears that one of the parties is entitled to judgment as a matter of law within the framework of the case. *Simpson v. Broadway-Manhattan Taxicab Corp.*, 203 Va. 892, 128 S.E.2d 306 (1962). No material fact is in dispute in Plaintiff's case, and he is entitled to judgment as a matter of law.

#### ARGUMENT

I. Defendant Violated Virginia Code Section 8.01-40(A) as a Matter of Law.

Entirely apart, however, from the metaphysical niceties, the reality of a case as we have here is, in the court's opinion, simply this: plaintiffs' names and likeness belong to them. As such they are property. They are things of value. Defendant has made them so, for it has taken them for its own commercial benefit.

*Lavery v. Automation Management Consultants*, 234 Va. 145, 154, 360 S.E.2d 336, 342 (1987) (quoting *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 75-76 (N.J. Super. 1967) (emphasis added) (attached hereto as Exhibit A).

Ordinary citizens are entitled to the protective mantle of Virginia's statute [8.01-40(A)].

*Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 1995 Va. LEXIS 54 (April 25, 1995) (emphasis added) (attached hereto as Exhibit B).

The Virginia Supreme Court's interpretation of Virginia Code Section 8.01-40(A), as quoted above, demonstrates conclusively that the statute creates a property right in a person's name and/or likeness and that this property right is vested in all persons.<1>

Plaintiff Ram Avrahami has, therefore, a property right in his name and/or likeness which cannot be used for the purposes of trade without his written consent. Defendant has as a matter of law violated Plaintiff's property rights by obtaining a commercial benefit from the transfer of Plaintiff's name to the Smithsonian Magazine without having first obtained his written consent.

A violation of the plain language of 8.01-40(A) under the facts of this case requires proof of the following: (a) Defendant's use of Plaintiff's name for the purposes of trade; (b) Defendant's failure to obtain Plaintiff's written consent; and (c) injury

sustained by reason of such use. The undisputed facts of this case as applied to these elements demonstrate conclusively that Plaintiff is entitled to judgment as a matter of law.

- (a) Defendant U.S. News Used Plaintiff's Name For the Purposes of Trade By Transferring Plaintiff's Name to the Smithsonian Magazine For a Commercial Benefit.

There is no dispute that Plaintiff's name was rented or "exchanged" as part of a mailing list provided by U.S. News to the Smithsonian Magazine. In Defendant's Motion for Stay, Exhibit A, Defendant attached its Motion for Declaratory Judgment. In Paragraph 20 of Defendant's declaratory judgment motion, Defendant wrote:

On or about March 24, 1995, the Smithsonian Magazine ordered a mailing list of 100,000 names and addresses from U.S. News pursuant to a list exchange agreement between U.S. News and the Smithsonian sated March 5, 1995.

Paragraph 21 of Defendant's motion reads further:

On or about April 12, 1995, U.S. News caused a mailing list of 100,000 names and addresses to be shipped to the Smithsonian or its agent, which list included Mr. Avrahami's name and address.

In Plaintiff's Motion for Judgment, Exhibit A, the Smithsonian by correspondence dated June 2, 1995, admitted that it had "rented [Plaintiff's] name from U.S. News and World Report for a one time use." It is immaterial whether the transaction by which Plaintiff's name was transferred from the Defendant to the Smithsonian is characterized as a "rental" or an "exchange". Virginia Code Section 8.01-40(A) requires only that a person's name be used "for the purposes of trade." The Supreme Court of Virginia has interpreted this language to require only that a person or company obtain a "commercial benefit" from the use of a name and/or likeness. In *Lavery*, 234 Va. at 154, 360 S.E.2d at 342, the Virginia Supreme Court, in interpreting 8.01-40(A), held as follows:

We therefore hold that, insofar as plaintiff's claim is based on the appropriations of their likeness and name for defendant's commercial benefit, it is an action for invasion of their "property" rights.... We hold that Code @ 8.01-40(A)

creates in an individual a species of property right in their name and likeness.<2>

When the mailing lists were "exchanged" between the Defendant and Smithsonian, the names on the lists were then used to solicit new subscribers, evidenced by the solicitation received by Plaintiff from the Smithsonian and the Smithsonian's admission that it rented Plaintiff's name from Defendant "for a one time use." By transferring Plaintiff's name to the Smithsonian, the Defendant received the benefit of another name with equal commercial value from the Smithsonian.<3> When Defendant U.S. News transferred Plaintiff's name to the Smithsonian, it obtained a commercial benefit from the transaction, and it used Plaintiff's name, therefore, for the purposes of trade.

(b) Defendant Did Not Obtain Plaintiff's Written Consent to Use His Name for the Purposes of Trade.

There is no dispute that Defendant failed to obtain the prior written consent of Plaintiff before using his name for the purposes of trade. By failing to obtain Plaintiff's written consent prior to this transfer, Defendant violated Plaintiff's property rights and 8.01-40(A).

(c) Plaintiff Has Suffered Damages as a Result of Defendant's Violation of 8.01-40(A).

The commercial benefit that Defendant acquired from the transfer of Plaintiff's name was solely the Defendant's. The use of Plaintiff's property without his permission damaged Plaintiff to the extent that Defendant benefitted commercially. Although Plaintiff's proof of actual damages may be slight, the Virginia Supreme Court has held that where a misappropriation of a person's property rights under 8.01-40(A) occurs, and the damages are not readily quantifiable, an award of nominal damages is appropriate:

An award of nominal damages is appropriate when there is a legal right to be vindicated against an invasion that has produced no actual, present loss of any kind of where, from the nature of the case, some injury has been done but the proof fails to show the amount.

Town & Country Props., Inc., 457 S.E.2nd 356 (citations omitted).

As the Virginia Supreme Court has held, "plaintiffs' names and likenesses belong to them." If they are used without permission, the measure of damages is the commercial benefit obtained by the person or company liable for the misuse. Regardless, therefore, of whether the measure of Plaintiff's damages is nominal, an injury has been done and a right must be vindicated.

II. Defendant Exercised Dominion Over Plaintiff's Name and/or Likeness Without His Consent and Violated Plaintiff's Property Rights.

The Virginia Supreme Court has held that one holds a property interest in one's name and/or likeness. See *Lavery*, 234 Va. at 154, 360 S.E.2nd at 342. A party is liable for conversion when it uses another's property as its own and exercises dominion over it without the owner's consent. *Town & Country Props., Inc.*, 457 S.E.2nd 356. Defendant transferred Plaintiff's name to the Smithsonian without the knowledge or consent of Plaintiff. Through this transfer, the Defendant exercised dominion over Plaintiff's property and obtained a commercial benefit from its use. The conversion of Plaintiff's name without his consent proximately caused damages including the commercial value of Plaintiff's name and the time spent by Plaintiff ascertaining how his name was misused. Defendant thereby violated Plaintiff's property rights and damaged Plaintiff.

III. Conclusion

WHEREFORE, for the aforementioned reasons, Plaintiff prays that this Court enter judgment for Plaintiff on Counts I and II, and allow Plaintiff to proceed on proof of damages alone.

Respectfully submitted,

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By Counsel

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<1> Virginia Code Section 8.01-40(A) reads in pertinent part as follows:

Any person whose name ... is used without having first obtained the written consent of such person, ... for the purposes of trade, such persons may ... sue and recover damages for any injury sustained by reason of such use.

<2> The Court relied in large part on the fact that it was the Virginia General Assembly's intent, in enacting 8.01-40, to create a property right in one's name and/or likeness:

[T]he fact that the General Assembly gave even limited survivability to claims under the statute indicates the legislature's intent that a property right was created by the statute.

Id., at 151 (citing *Keepe v. Shell Oil*, 220 Va. 587, 260 S.E.2d 722 (1979)).

<3> Plaintiff asks the Court to take judicial notice of the "Direct Marketing List Source," part of which is attached hereto as Exhibit C. This publication lists hundreds of consumer lists which are offered for sale by various companies. This publication includes the list offering by U.S. News, who offers its subscriber lists for a base price of \$80.00 or \$85.00 per thousand names. There can be no dispute, therefore, that Defendants acquires a commercial benefit from the sale of person's names.

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