

ROBERT L. HABUSH and DANIEL A. ROTTIER

Plaintiffs,

Case No. 09-CV-18149

-vs-

WILLIAM M. CANNON, PATRICK O. DUNPHY

and CANNON & DUNPHY, S.C.,

Defendants.

DECISION

As discussed in detail below, plaintiffs have established that defendants “invaded their privacy” by using their names without consent for purposes of advertising and trade. The plaintiffs, however, are unable to establish that such use was done unreasonably. There are no disputed facts of significance in this case. Because the plaintiffs cannot show that defendants *unreasonably* invaded their privacy, there is nothing for determination at a trial. The defendants are entitled to summary judgment in their favor.

I. Nature of the Case**A. Facts**

Robert L. Habush and Daniel A. Rottier are personal injury trial lawyers. They are shareholders in the law firm of Habush Habush & Rottier, S.C., which has offices throughout the state of Wisconsin. William M. Cannon and Patrick O. Dunphy are also personal injury trial lawyers. They are shareholders in the firm of Cannon & Dunphy,

S.C., which has its office in Brookfield, Wisconsin. Mr. Habush, Mr. Rottier, Mr. Cannon, and Mr. Dunphy are among the most highly-skilled and successful trial lawyers in Wisconsin's recent history.

Google, Yahoo!, and Bing are search engines that yield results for Internet searchers in at least three ways.

- “Organic” results appear in response to a user’s input of search terms based upon a proprietary algorithm.
- “Advertising” appears as a link or block ad in a column normally to the right of the organic search. Clicking on the ad will take the user to the advertiser’s website.
- “Sponsored links” appear above or within the organic results. 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.”

Beginning in 2009, defendant Cannon & Dunphy, S.C. 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.¹ Cannon & Dunphy, S.C. 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.”²

¹ The search engines do not distinguish if the entry is in any combination of upper or lower case letters. Throughout this decision, the words will be capitalized.

² The first two web screenshots included in this decision were captured and supplied by the parties in 2010. The clarity and saturation have been enhanced using Adobe Photoshop so as to accurately print on plain paper what normally appears on an Internet searcher’s computer screen. The “pages similar” screen was retrieved in May, 2011, and has been similarly enhanced.



habush

Search

[Advanced Search](#)

Web [+ Show options...](#)

Results 1 - 10 of about 536,000 for habush. (0.30 seconds)

[CD Cannon & Dunphy S.C.](#)

Sponsored Link

www.Cannon-Dunphy.com Board certified trial attorneys with a reputation for winning.

[+ Show map of 595 N Barker Rd, Brookfield, WI](#)



[Habush Habush & Rottier SC](#)

www.habush.com

777 East Wisconsin Avenue
Milwaukee, WI 53202-5381
(414) 271-0900

[Get directions](#) - [Is this accurate?](#)

Bus: [Wisconsin & Cass](#)

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Nature of the Case

B. Statute at Issue

In Wisconsin, as well as most other jurisdictions in the United States, the law offers protection for the “good name” of any living person. This legal protection is often referred to as the “right of publicity.” This right gives a person legal control over the use of his or her name or image for commercial purposes.

Wisconsin’s right of publicity is codified within a statute relating to invasions of privacy. In Wisconsin it is an “invasion of privacy” to violate a person’s right of publicity.

Specifically, § 995.50(2)(b) defines “invasion of privacy” to include the following:

The use, for advertising purposes or for purposes of trade, of the name . . . of any living person, without having first obtained the written consent of the person

Wis. Stat. § 995.50(1), also provides that:

One whose privacy is unreasonably invaded is entitled to . . . [e]quitable relief to prevent and restrain such invasion

The Wisconsin Supreme Court has distinguished the right of publicity from other privacy rights as follows:

A cause of action for the appropriation of a person's name for trade purposes is different in nature from other privacy torts The appropriation cause of action protects not merely the right to be let alone but, rather, protects primarily the property rights in the publicity value of aspects of a person's identity.

. . . .

The appropriation tort . . . protects primarily the property interest in the publicity value of one's name.

Hirsch v. S.C. Johnson & Son, Inc., 90 Wis.2d 379, 383, 387 (1979).

Nature of the Case

C. Relief Sought

Robert L. Habush and Daniel A. Rottier have each carefully cultivated their good names over decades in the practice of law in Wisconsin. Through excellence in advocacy, extensive and respectable advertising, and substantial charitable giving of time and money, each has earned highly favorable name recognition throughout the state. Under Wisconsin law, each has a “property interest in the publicity value of [his] name.” *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 383, 387 (1979).

Robert L. Habush and Daniel A. Rottier³ brought this lawsuit against Cannon & Dunphy, S.C., William M. Cannon, and Patrick O. Dunphy, seeking an injunction under Wis. Stat. § 995.50, to prevent the continued use of the sponsored links described above.

³ The law firm of Habush Habush & Rottier, S.C. was initially also a plaintiff. It was dismissed in a prior ruling of this court.

Plaintiffs seek a permanent injunction prohibiting defendants from using their names as keywords for Internet searches.

Defendants have responded by asserting that the elements necessary to create a cause of action under Wis. Stat. § 995.50 are not met by the conduct the plaintiffs seek to restrain. Additionally, defendants set forth affirmative defenses that:

- 1) their conduct is protected by the freedom of speech provisions of the First Amendment to the Constitution of the United States; and
- 2) because the plaintiffs participate in similar conduct with respect to different search engines, they are not entitled to injunctive relief from a court.⁴

Nature of the Case

D. Status of the Case

The parties agree that there is no need for trial because there is no genuine dispute as to any material fact. Each side asserts an entitlement to summary judgment in its favor.

This decision will first address defendants' affirmative defenses, followed by the elements of the plaintiffs' statutory claim. In developing this document, this judge has benefitted greatly by the thorough and excellent advocacy from attorneys on both sides and by the incalculable assistance of law clerks Lauren Jankowski, Jill Juedes, and Lindsey Larson.

II. Analysis of Issues

A. Affirmative Defenses

1. First Amendment Protection

Initially, defendants assert that plaintiffs cannot receive the relief they seek regardless of whether or not they violated plaintiffs' rights under the statute at issue. First, defendants argue that their use of search engine sponsored links is protected by

⁴ In their answer, defendants asserted several affirmative defenses. This decision deals only with those argued in defendants' motion for summary judgment.

the First Amendment of the U.S. Constitution. Second, they assert plaintiffs have engaged in the very same conduct, and therefore equitable relief is barred under the doctrine of “unclean hands.”

The First Amendment of the U.S. Constitution says “Congress shall make no law . . . abridging the freedom of speech” The defendants argue that the First Amendment protects their right to purchase the top result (as a sponsored link) to a search of the name “Habush” or “Rottier.” The argument fails because the use of a computerized system to sequence search results is not speech. Plaintiffs take no issue with the message or content of the text of defendants’ sponsored link. Nor do plaintiffs object to anything on defendants’ website. This lawsuit involves the hidden process which causes the link to appear at all. That process is content neutral. It is not information; nor is it a message of any sort. It is not speech, commercial or otherwise. Therefore, it is not subject to the protection of the First Amendment.

Because defendants’ conduct is not speech, plaintiffs’ cause of action does not impair or restrict the defendants’ First Amendment rights. Therefore, defendants’ cannot use the First Amendment to protect them from this lawsuit. As a matter of law, this defense fails.

Analysis of Issues

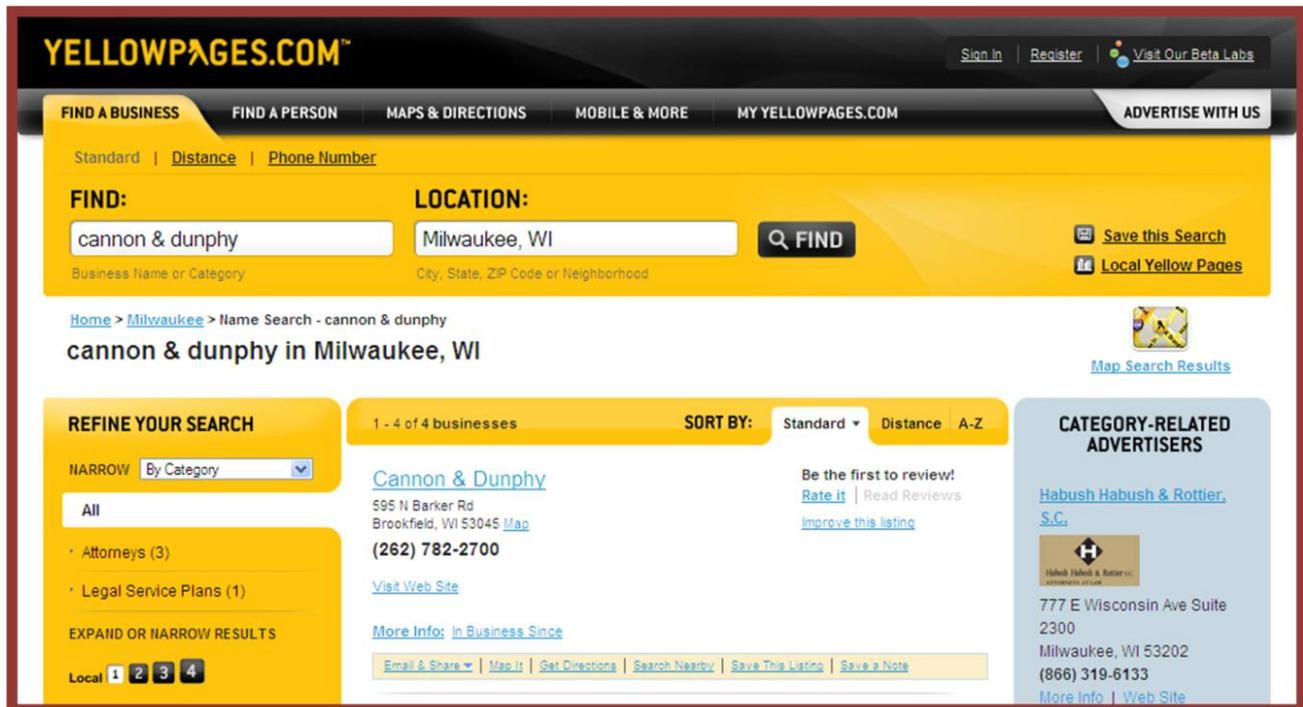
Affirmative Defenses

2. “Unclean Hands”

Defendants next assert that plaintiffs’ claim must be denied under the principle of law that no party is entitled to injunctive relief to halt another from conduct in which the party seeking relief itself intentionally engages. They argue that plaintiffs engaged in conduct so similar to what they seek to enjoin that their claim should be summarily denied.

Defendants point to www.yellowpages.com, www.AnyWho.com, and 411.yellowpages.com, where a Habush firm block ad appeared in response to a search using the name of any prominent Milwaukee personal injury attorney.

As the screenshot below demonstrates, one searching for the name “Cannon,” “Dunphy,” or “Cannon & Dunphy” would see the rectangular ‘tile’ ad and link for the Habush firm along the right border of the page opposite the generic result and link for “William Cannon.”



Defendants argue that no party has the right to a court order restraining another from conduct in which the party itself also engages. They rely on the common law principle that a party with “unclean hands” may not obtain an injunction to prevent what the party itself already does. They cite published decisions from several courts. The case of *Stokely-Van Camp, Inc. v. Coca-Cola Co.*, 646 F. Supp. 2d 510 (S.D.N.Y. 2009), is illustrative. That lawsuit was brought by the maker of Gatorade (SVC) against the maker of Powerade (Coca-Cola).

SVC complains about Coca-Cola's claims regarding the presence of calcium and magnesium in Powerade ION4, but it has made virtually identical claims about calcium and magnesium in its own Gatorade Endurance Formula. Courts in this Circuit and elsewhere have routinely found that a plaintiff's misconduct relates to the subject matter of its claims where, as here, the plaintiff has engaged in the same kind of behavior that it challenges.

646 F. Supp. 2d at 533.

The same decision also discussed earlier precedent:

In a similar case, the producer of Haagen-Dazs ice cream sought a preliminary injunction against a competitor, Frusen Gladje, whose packaging allegedly was “intended to deceive the public into believing that their product is made and/or sold in Sweden” when in fact it was produced in the United States. *Haagen-Dazs v. Frusen Gladje*, 493 F. Supp. 73, 75-76 (S.D.N.Y.1980). But Haagen-Dazs itself engaged in the same alleged misconduct: although Haagen-Dazs's name suggested its ice cream was Scandinavian in origin, its ice cream was produced in the United States. The court held that Haagen-Dazs was “guilty of the same deceptive trade practices of which it accuses defendants,” and concluded that “since plaintiff’s hands are similarly unclean, they may not secure equitable relief” *Id.* at 76. See also *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 354-56 (S.D.N.Y.2008) (applying unclean hands doctrine where plaintiff had engaged in advertising virtually identical to the allegedly false advertising of defendant) . . .

Stokely-Van Camp, Inc., 646 F. Supp. 2d at 533.

Thus, had Mr. Habush or Mr. Rottier used the same Internet strategy to drive searchers to a website as did defendants, they would have “unclean hands” and lose their right to relief from this court.

The undisputed facts defeat the claim of unclean hands. Plaintiffs have filled in the details behind the Anywho, Yellowpages, and 411search results: They never requested the website tile ads. The ads were offered by the publisher as a free “throw-in” for renewal of the firm’s purchase of the full back cover of the printed Yellow Pages directory. An employee of the Habush firm sent a copy of what the ad would look like to Robert Habush and he apparently approved the layout. He understood this to be a subject-based ad, not a name-search based ad. It was his understanding that the firm’s tile ad may appear to a searcher seeking “Attorneys,” “Accident & Property Damage Attorneys,” or “Personal Injury Attorneys.” The defendants do not dispute these facts.

Plaintiffs also point out that the publishers of www.yellowpages.com, www.AnyWho.com, and 411.yellowpages.com do not even offer to sell result-placement for searches on individual names. Instead, unbeknownst to the advertiser, the publisher (not the law firm) causes the tile ad to appear in response to any search of the name of specific attorneys who are listed in the category selected by the advertising purchaser.

After the Anywho.com and Yellowpages.com situation was brought to light in connection with this lawsuit, and well before the motions for summary judgment were filed, Robert Habush directed the publisher of these sites to cease the practices described above.

Plaintiffs cannot be held to have unclean hands when they never requested or even knew that their tile ad would appear in response to attorney name searches. Therefore, the defendants' "unclean hands" defense fails.

Analysis of Issues

C. Elements of Plaintiffs' Claim

Wisconsin Statutes section 995.50 allows any person whose "privacy is unreasonably invaded" to obtain an injunction "to prevent and restrain such invasion." To obtain such relief the plaintiff must prove two elements: 1) that his or her privacy was invaded; and 2) that the invasion of privacy was done "unreasonably." With respect to the statute's protection of one's "right of publicity," the term "invasion of privacy" is defined in Wis. Stat. § 955.50(2)(b) to include four components:

The use,
for advertising purposes or for purposes of trade,
of the name . . . of any living person,
without having first obtained the written consent of the person⁵

⁵ The entire statute is as follows:

995.50 Right of privacy. (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:

- (a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.
- (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.
- (c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

If each of the four parts is proven, the defendants have invaded the privacy of the plaintiffs. If the defendants committed the invasion of privacy “unreasonably,” the plaintiffs are entitled to relief under the statute.

Analysis of Issues

Elements of Plaintiffs’ Claim

1. Invasion of Privacy Components

a) The Use . . .

Defendants argue that their purchase of the words “Habush” and “Rottier” as Google, Yahoo!, and Bing search terms is not a “use” of plaintiffs’ names.

Defendants paid money to the search engine companies to ensure that the link to the Cannon & Dunphy, S.C. website would be triggered by any searcher’s entry of the words “Habush” or “Rottier.” Defendants assert that, although they actually bid on these precise words, their utilization of these words to yield their results is not a “use” of them because, to the searcher, plaintiffs’ names are hidden from view. The triggered top link in the search results is the link for Cannon & Dunphy, S.C. The text accompanying the link does not include either the name “Habush” or the name “Rottier.” Upon clicking the link, a user would see the website of Cannon & Dunphy, S.C., which includes no reference whatsoever to the names “Habush” or “Rottier.”

(d) Conduct that is prohibited under s. 942.09, regardless of whether there has been a criminal action related to the conduct, and regardless of the outcome of the criminal action, if there has been a criminal action related to the conduct.

(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.

(4) Compensatory damages are not limited to damages for pecuniary loss, but shall not be presumed in the absence of proof.

(6) (a) If judgment is entered in favor of the defendant in an action for invasion of privacy, the court shall determine if the action was frivolous. If the court determines that the action was frivolous, it shall award the defendant reasonable fees and costs relating to the defense of the action.

(b) In order to find an action for invasion of privacy to be frivolous under par. (a), the court must find either of the following:

1. The action was commenced in bad faith or for harassment purposes.
2. The action was devoid of arguable basis in law or equity.

(7) No action for invasion of privacy may be maintained under this section if the claim is based on an act which is permissible under ss. 196.63 or 968.27 to 968.37.

It is defendants' position that it is a violation of the right of publicity only if the plaintiff's name was used "in or on" the defendant's product or ad. Their logic is that although a person has a protectable property interest in the use of his or her name, it is only the explicit open display of the name that constitutes "use."

This argument fails for two reasons. First, the simple, plain English meaning of the word "use" certainly includes the purchase of a name to trigger results from a computer algorithm. Second, even if the law required the open display of a plaintiff's name, the search terms "Habush" or "Rottier" appear openly in close proximity to the Cannon & Dunphy, S.C. link.

Appellate courts occasionally find deep meaning, not visible upon first glance, to ordinary English terms. Trial judges, however, are often reminded *not* to look beyond the plain meaning of words if the words of a statute or contract are clear. The utilization, employment, application, or exploitation of anything for any purpose constitutes "use."

Defendants specified to Google, Yahoo!, and Bing the names "Habush" and "Rottier" as search terms. Such specification is, by definition, a "use" of those names.

Defendants are correct that the names "Habush" or "Rottier" appear nowhere in the text of their sponsored link or their linked website. However, a Google, Yahoo!, or Bing user searching for results using words which include "Habush" or "Rottier" would certainly see one or both of the plaintiffs' names in close proximity to the Cannon & Dunphy, S.C. link. The searcher caused the name of a plaintiff to appear by including that name as a search term.

Defendants have guaranteed that their company name and website link will appear sandwiched between two instances of a plaintiff's name. Above the Cannon & Dunphy, S.C. link is a display of the search box with the searched term(s) in it. Below the Cannon & Dunphy, S.C. link are the organic search results, one of which is an organic results link for the Habush Habush & Rottier, S.C. website, including the actual name Habush or Rottier. Even if open display must take place for "use" to occur, open

display of plaintiffs' names actually occurs by virtue of the triggered link to defendants' firm.

The non-appearance of plaintiffs' names within the defendants' sponsored link itself is a factor for consideration in determining whether the use of plaintiffs' names by the defendants is *unreasonable* under the fifth element of plaintiffs' claim. However, as to the first component, there are no genuine issues of material fact. Defendants have "used" the names of each plaintiff as a matter of law.

Analysis of Issues

Elements of Plaintiffs' Claim

Invasion of Privacy Components

b) . . . for Advertising Purposes or for Purposes of Trade . . .

Key in the word "Habush" to a search engine and a link will appear at the top of the search results for Cannon & Dunphy, S.C. From 2009 until recently in 2011, a similar result would appear in a Google or Bing search.⁶ Defendants argue that the link does not use plaintiffs' names for advertising purposes. The text of the Yahoo! "link" is as follows:

Cannon & Dunphy, S.C.

The top choice in Milwaukee for personal injury law-free consultation

www.cannon-dunphy.com

The Bing result was:

Cannon & Dunphy, S.C. www.Cannon-Dunphy.com

Milwaukee's leading personal injury attorneys-free initial interview

At one time the Google result was:

Cannon & Dunphy Attorneys

www.Cannon-Dunphy.com Milwaukee's leading personal injury attorneys-free initial interview!

⁶ A June 2011 search upon the "Habush" or "Rottier" name using Google or Bing does not return the Cannon & Dunphy, S.C. link. There is nothing in the record to indicate when or why the search results changed. Regardless of whether Habush Habush & Rottier, S.C. has outbid defendants for the Google and Bing locations, or whether the defendants have chosen to temporarily remove the sponsored links, this case remains viable. Plaintiffs seek an injunction not only to remove the sponsored link, but also prohibiting its future use.

At other times Google showed the following:

Cannon & Dunphy Attorneys

www.Cannon-Dunphy.com Board certified attorneys with a reputation for winning.

The text of each link shows itself to be advertising for Cannon & Dunphy, S.C. A click on the link will produce the Cannon & Dunphy, S.C. website, which certainly contains promotional material for defendants' law firm. The purpose of the link is obviously to drive trade to the Cannon & Dunphy, S.C. website and its office.

Defendants argue that the text of the law has a narrower meaning than the simple words reveal. They assert that in light of the right of free speech, our state's policy of competition, and prior case law, the words cannot be read to mean what they say. Defendants suggest that the *legal* meaning (as opposed to the plain English meaning) requires two conditions to be met before a court can find use of a plaintiff's name "for advertising purposes or for purposes of trade":

- 1) the name of a plaintiff must exist in or on defendant's ad; and
- 2) the defendant's actual ad must suggest a plaintiff's endorsement of defendant's product or services.

In this case there can be no reason for defendants to use the plaintiffs' names other than for purposes of trade. Nothing in the text of our statute requires the actual display of the plaintiff's name to appear on the defendant's ad to establish an invasion of privacy. Nor is there any requirement of an apparent endorsement by the plaintiff to establish use for advertising purposes or for trade. If the Wisconsin legislature wanted to require either of the above conditions, it could have put those requirements in the Statute. There is no need for a judge to find hidden meanings to statutory words that are, on their face, understandable.

None of the authorities that the defendants offered (all of which were published decades before Google was created) hold that the behind-the-scenes or undisclosed use of another living person's name can never be "for advertising purposes or purposes of trade." Such a proposition defies common sense.

It is beyond dispute that the Cannon & Dunphy, S.C. link embodies no endorsement of Cannon & Dunphy, S.C. by the plaintiffs. While this fact is relevant in assessing the *reasonableness* of the defendants' conduct under the second element of plaintiffs' claim, it does not undermine the "for advertising purposes or for purposes of trade" component of the plaintiffs' claim.

Analysis of Issues
Elements of Plaintiffs' Claim
Invasion of Privacy Components
c) . . . the Name . . . of Any Living Person . . .

Defendants concede that the key words "Habush" and "Rottier" represent the names of the living people Robert L. Habush and Daniel A. Rottier.⁷ There is no disputed fact on this component of the invasion of privacy element of the plaintiffs' claim.

Over the years, plaintiffs have caused their names to take on a secondary meaning. "Habush, Habush & Rottier" is the name of a corporation. Naturally, the individual plaintiffs have worked to build the image and name recognition of the *firm* as an entity distinct from themselves. Although there is no dispute that the words used by defendants are the names of the plaintiffs, the dual purpose of these names is a factor in determining whether their use is *unreasonable* under the second element of claim.

Analysis of Issues
Elements of Plaintiffs' Claim
Invasion of Privacy Components
d) . . . Without . . . Written Consent . . .

The defendants assert that plaintiffs have consented to the defendants' use of their names because of certain agreements the plaintiffs' firm entered into with Google, Yahoo!, and Bing.

Neither Robert L. Habush nor Daniel A. Rottier gave written consent directly to Cannon & Dunphy, S.C. for it to use either of their names for any purpose at all.

⁷ Letter from defendants' attorney to Judge Kahn, August 30, 2010.

Defendants argue that plaintiffs authorized the law firm of Habush Habush & Rottier, S.C. to use their names for marketing purposes. They further assert that Habush Habush & Rottier, S.C., in turn, entered into contracts with Google and Yahoo! to market the firm. Defendants argue that the terms and conditions of those contracts amount to consent for other Google and Yahoo! customers to use the plaintiffs' names for advertising and trade.

Defendants have cited no law to support the proposition that the grant to an entity of the right to use one's name carries with it the authority of the licensee to regrant the right to others. The only authority cited by either party is the Restatement (Second) of Torts, regarding Invasion of Privacy, as follows:

The plaintiff may, for example, agree to permit only one person upon only one occasion to make use of his picture for advertising purposes. In that case the consent does not protect another person who invades the plaintiff's privacy on another occasion, even though he may do so in precisely the same way.

Restatement (Second) of Torts § 652F, cmt. B (1977).

The Restatement text is of some, but little, help. Our facts present circumstances substantially different from the hypothetical in the Restatement of Torts. The plaintiffs' argument is more persuasive. Absent clear authorization from plaintiffs that their licensee may consent to the use of their names by others, plaintiffs themselves retain their rights under Wis. Stat. § 995.50 as against the third party.

Even if Habush Habush & Rottier, S.C. had the authority to consent to the use by others of plaintiffs' names, the Google and Yahoo! contracts do no such thing.

The interpretation of an unambiguous contract is a question of law solely for the court's determination. *Jos. P. Jansen Co., Inc. v. Milwaukee Area Dist. Bd. of Vocational, Technical, and Adult Educ.*, 105 Wis. 2d 1, 13 (1981). The Wisconsin Court of Appeals has explained, "[w]here terms of a contract are plain and unambiguous, the court will interpret it as it stands, even though the parties may have interpreted it differently." *Campion v. Montgomery Elevator Co.*, 172 Wis. 2d 405, 416 (Ct. App. 1992). Thus, courts consistently have not departed from the plain meaning of the contract. *Keller v. Keller*, 214 Wis. 2d 32, 37 (Ct. App. 1997).

Some of the language in the Google⁸ contract, read in isolation, might suggest that the party to the contract consents to the use of all content supplied by the party for advertising by anyone Google allows. Supplied content would include the names of living individuals. Specifically, section 17.1 of the contract says that Google services “are supported by advertising revenue and may display advertisements and promotions. These advertisements may be targeted to the content of information stored on the Services, queries made through the Services or other information.” Further, section 17.3 of the contract states that: “you agree that Google may place such advertising on the Services.”

Defendants are mistaken in asserting that the contract with Google, even if it had been ratified by the individual plaintiffs, amounts to consent for defendants to use the plaintiffs’ names. The quoted language must be read in context with additional terms that protect the plaintiffs’ rights. Section 11.1 grants Google the right to reproduce, display, publish, and distribute submitted content. But this section also allows the party contracting with Google to “retain copyright and any other rights you already hold in Content which you submit” Additionally, section 20.6 applies the contract terms to Google and Google-owned companies but explicitly states that “no other person or company shall be third party beneficiaries”

Consent for the use of one’s name under Wis. Stat. § 995.50 cannot be accidental or incidental. It must be clear consent for the use sought by another. Here, there was no such consent by either plaintiff. On the question of consent, there are no facts in dispute. As a matter of law, the plaintiffs did not consent to defendants’ use of their names.

Analysis of Issues

Elements of Plaintiffs’ Claim

2. Unreasonably

As set forth above, the defendants used plaintiffs’ names for advertising and trade purposes without the plaintiffs’ consent. Thus, plaintiffs have established that, under

⁸ Habush Habush & Rottier, S.C. contracted with both Google and Yahoo!. Defendants assert that both have language supporting their position. The primary focus of the parties was the contract with Google, as its language is more explicit. There is no need for this opinion to address both.

Wis. Stat. § 995.50, defendants invaded their privacy. However, to obtain the relief sought, plaintiffs must establish not only that their privacy was invaded, but also that the invasion was done “unreasonably.”⁹ The remaining question, then, is whether the plaintiffs have established that the invasion of privacy – defendants’ use of their names – was done “unreasonably.”

The statute on which this claim is based provides no definition for the word “unreasonably.” The terms “reasonable” and “unreasonable” are pervasive in the law. Black's Law Dictionary (9th ed. 2009) defines “unreasonable” as “[n]ot guided by reason; irrational or capricious.” Our court of appeals has “equated the term ‘unreasonable’ with irrational or lacking ‘a rational basis.’” *Glacier State Distribution Services, Inc. v. Wisconsin Dept. of Transp.*, 221 Wis.2d 359, 370 (Ct. App. 1998) (citation omitted).

⁹ Plaintiffs take the position that the statute establishes strict liability for any invader of privacy. They maintain that whoever “invades the privacy” of another violates its terms. Against the unmistakable, unambiguous language of Wis. Stat. § 995.50(1), they assert that the legislature never intended to make *unreasonableness* an element of the claim, above and beyond the elements creating an invasion of privacy.

Plaintiffs point out that “invasion of privacy” describes several distinct types of conduct. Under Wis. Stat. § 995.50(2)(a) a highly offensive intrusion constitutes an invasion. Under Wis. Stat. § 995.50(2)(c) highly offensive publicity creates the invasion. Because both subsections (a) and (c) contain language referring to a “reasonable person,” plaintiffs argue the term “unreasonably invaded” in Wis. Stat. § 995.50(1) merely restates that reasonableness is implicit in any finding of “invasion of privacy” under subsections (a) and (c). They say that the term “unreasonably invaded” in § 995.50(1) is redundant to the “reasonable person” language in §§ 995.50(2)(a) and (c), adds nothing to the statute, and has no real meaning above and beyond the terms in the subsections alone.

They are mistaken. The term “unreasonably” in the primary text of Wis. Stat. § 995.50(1), is not redundant or surplus to the standards of reasonableness set forth in Wis. Stat. §§ 995.50(2)(a) and (c). This issue was thoroughly analyzed at a hearing March 10, 2010. In addition to the reasoning set forth at that hearing consider the following illustration:

Wis. Stat. § 995.50(2)(a) defines “invasion of privacy” to include an “[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private”

Although the term “reasonable” is set forth twice in this sub-section, the legislature decided to make a party culpable only if that conduct was committed “unreasonably.” For example, if a man walks in to an occupied stall in a women’s restroom, the conduct would be highly offensive to a reasonable person in a place that a reasonable person would consider private. Nevertheless, if the man’s conduct was not done unreasonably, there would be no liability. If the first two letters on the door of the restroom were blocked and the man, in a hurry, saw only the word “men,” the plaintiff might be unable to sustain the burden of establishing the unreasonableness of the invasion of privacy. The legislature is presumed to intend the meaning of the language it selected. In this case, the language is perfectly sensible and neither redundant nor ambiguous.

Ultimately, a determination of reasonableness or unreasonableness must be based upon the particular circumstances present in each case. It requires weighing and balancing the relevant factors. With this in mind, aweigh we go.

Analysis of Issues

Elements of Plaintiffs' Claim

Unreasonably

a) Standard and Historic Methods of Competition

“The freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system.” Restatement (Third) of Unfair Competition , §1, Cmt. (a), (Current through June 2010). In Wisconsin, the “fundamental economic policy of this state” is “competition.” Wis. Stat. § 133.01. “The freedom to compete implies a right to induce prospective customers to do business with the actor rather than with the actor's competitors. [A seller is permitted] to seek to divert business not only from competitors generally, but also from a particular competitor.” Restatement (Third) of Unfair Competition , §1, Cmt. (a).

Any analysis of the question of reasonableness must take into account the fundamental policy stated above. Therefore, it is appropriate to review historic methods of competition and apply that review to the emerging landscape of the Internet.

In the development of commerce in the United States, a frequent method of competition has been for one business to start up in close physical proximity to its competitor. This is common knowledge. A Chevrolet dealership in the post-World War II era would open shop on a large lot at the edge of town. Within a year or two, a Ford dealership was across the street. McDonalds may operate alone in a commercial district for a while, but before long, Wendy’s or Burger King pops up nearby. Cannon & Dunphy, S.C. would have every right to open an office next door to Habush Habush & Rottier, S.C. This is not in dispute.

In New York and elsewhere, entire neighborhoods are dedicated (and even named for) the nature of commerce that developed there. The Garment District and the Diamond District are but two examples. The first business owner at any location may have been quite unhappy to see others come to take advantage of his or her success. But

the primacy of competition as an economic policy has protected the right of others to share the block.

Both parties in this lawsuit acknowledge it would be entirely appropriate for one to place an advertising billboard next to the billboard of the other. In fact, the plaintiff would have no legal recourse were defendants to install billboards next to or across the street from each of their firm's offices.

Defendants argue that their use of the plaintiffs' names as key-words is a present day approach to such location competition. Although the defendants are not physically appearing at the business address of plaintiffs, their names show up when potential clients are seeking the plaintiffs.

In ancient times, people used paper telephone directories. A user could find a particular attorney by viewing the alphabetical listings while carefully avoiding the block ads preceding and to either side of the name being searched. The plaintiffs themselves sought the attention of everyone seeking anything in the directory by placing a full page ad on the back cover of the telephone book.¹⁰ Within the attorney listings in the directory, the very first result returned to a searcher is a double-page ad for whichever firm paid substantial sums to obtain that placement. One might think that a natural or organic result of an attorney search in a business directory would be the alphabetical list of lawyers. To the contrary, competition has historically allowed attorneys and firms to obtain a priority position through payment of a premium.

Television and radio advertising is useful as a shotgun approach to inform the public of the availability of one's offered services. A more targeted approach, however, is to be at the very place a motivated purchaser would be when that purchaser is shopping for such services. It used to be the telephone directory. Now that place is the Internet.

Defendants argue that their methods allow the consumers of legal services to compare qualifications and offered services among various law firms. Consumers seeking the services may find it easier, and be more likely to, search for the name of a

¹⁰ Affidavit of Robert L. Habush, April 21, 2010, paragraph 4.

recognized law firm than to key-in “personal injury lawyers Milwaukee.” Defendants are correct that this tends to put businesses in the relative positions on the Internet that they were once in when clients used telephone directories.

Defendants could write to the TV stations that carry ads for Habush Habush & Rottier, S.C. They could ask to purchase ad-time within 20 minutes of every add run by the Habush firm. If the defendants did this, they would be using the name of plaintiffs for purposes of advertising without the plaintiffs’ consent. But such use is consistent with the principles of energetic business competition in our state and is not unreasonable.

Analysis of Issues

Elements of Plaintiffs’ Claim

Unreasonably

b) Person/Firm Integration

The defendants point out that the words “Habush” and “Rottier” have a secondary meaning, other than referencing the two plaintiffs. The defendants are entitled to a real-world analysis of how this impacts the reasonableness of their conduct.

When an individual keys in the word “Habush” or the word “Rottier,” what exactly is that person looking for? Is it the individual Robert L. Habush? The individual Daniel A. Rottier? Or is it the law firm of Habush Habush & Rottier, S.C.?

Through his own efforts and abilities, Mr. Habush established his reputation as an excellent trial lawyer. Mr. Rottier did the same. But neither of them can handle the high volume of clients the firm has cultivated. So they pursued a strategy to develop the firm as its own entity and to give the firm its own reputation above and beyond the reputation of the individuals Habush and Rottier. The plaintiffs have chosen to intertwine their own names into the firm in which they hold shares. The firm has expended substantial funds establishing the firm’s own reputation as a distinct entity. The ads do not say: “*Robert L. Habush, why choose anyone else?*” They say: “*Habush, Habush and Rottier, . . .*”

This is illustrated by the press release issued by Habush Habush & Rottier, S.C. on November 19, 2009, about the filing of this lawsuit. At the bottom of the ten-sentence text is the following:

ABOUT HABUSH HABUSH & ROTTIER, S.C.

Habush Habush & Rottier has served Wisconsin as a personal injury *law firm* for more than 75 years. *The firm* handles cases from simple auto accidents to complex and difficult claims involving catastrophic injuries or death from medical negligence, product or machine defects, or construction negligence. *The firm* has more National Board of Trial Advocacy *certified trial lawyers* than any other *law firm* in the United States. The firm also lists *more past presidents* of state and national trial lawyer associations, *attorneys* named among the best lawyers in America, and *law school instructors* than any other personal injury *law firm* in Wisconsin. *The firm* has *offices throughout Wisconsin* in Milwaukee, Waukesha, Madison, Appleton, Green Bay, Racine, Kenosha, Lake Geneva, Wausau, Rhinelander, Sheboygan, Stevens Point and West Bend. [Italics added in *Habush v. Cannon* decision]

The carefully crafted description promotes the law firm as a whole. It accentuates the worthiness of the entire group of lawyers, not the individual accomplishments of named partners. The body of the press release also primarily promotes the firm, not the individual named partners. This is consistent with the bulk of plaintiffs' advertising and promotional pieces which are part of the record in this lawsuit. Although a photo of Robert Habush may be included in some ads, the promotion is for the business entity of Habush Habush & Rottier, S.C.

Through advertising and promotion, the plaintiffs have told the world, in effect, that the firm is better than either plaintiff himself. They have used their good names and reputations to *endorse* a particular company, Habush Habush & Rottier, S.C. They have allowed the company to use their names and images. This includes the use of their names in the company name. Presumably, each plaintiff receives remuneration for the endorsement, at least as a partner in the firm.

This business practice is not unique to Habush Habush & Rottier, S.C. If one Googles the term “Russ Darrow,” does that mean she expects to have Russ Darrow personally show the new and used cars on the dealership lot?¹¹ David Hobbs built his reputation as a race-car driver, but a Google search on his name would likely be intended to find his car dealership company. Like Russ Darrow and Habush Habush & Rottier, S.C., David Hobbs Honda advertises extensively using the business or dealership name (which includes the name of the living person).

In fact, Internet users seeking the Darrow or Hobbs dealerships or the Habush law firm have no obvious way to find it *other than* using the name of the living individual. The installation of their names into the name of the company provides an endorsement benefitting both the plaintiffs and their company. At the same time, however, it diminishes their ability to control the use of the name-words because the word represents a company in addition to representing a living person.

This diminution of the significance of the living person name “Habush” or “Rottier” in direct proportion to the enhancement of the reputation of the corporate entity is a factor in determining whether a particular use by defendants is unreasonable under Wis. Stat. § 995.50(1).

The plaintiffs have made their names inseparable from the firm name. The firm, itself, does not have the protection that § 995.50 provides to a living person. No firm does. Nothing in the history of the right of publicity gives a corporation the ability to inoculate itself against certain types of competition by choosing a celebrity name as the name of the company. As stated above, there is no doubt that the names of the plaintiffs were used by defendants. However, any unreasonableness in using those names is reduced by the dual meanings they carry.

¹¹ Russ Darrow Group and David Hobbs Honda are large car dealerships in Milwaukee.

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c) User Confusion

The potential for customer confusion is another factor for consideration in determining whether the defendants' use of plaintiffs' names is unreasonable. Users of Internet search engines know that results of searches usually have some level of relevance to the search terms. The *most* a searcher can expect is a panoply of relevant results. Google does not guarantee that the top result will be precisely what the searcher had in mind. The value and effectiveness of Internet searches is dependent upon the opportunity for users to review the text of various links. Sometimes the top link is the best, other times users review several links before finding a desired web page.

Internet users, and consumers in general, have learned to be skeptical about the first impression they may receive from a web page or commercial advertisement. The result of an Internet search is a list of link offerings from a variety of sources and vendors. As with other situations in life, people are capable of scanning, comparing, and contrasting the list presented. For any option that appears interesting, the user can go directly to the linked site or keep the main list and open the linked site in a new tab or new browser window.

The plaintiffs have presented no evidence to show that any particular person ever became confused by the Cannon & Dunphy, S.C. sponsored link. If a user earnestly looking for Robert L. Habush or Daniel A. Rottier ends up clicking on the link to the Cannon & Dunphy, S.C. website, that person will recognize the anomaly and return to view the remaining search results to find Mr. Habush or Mr. Rottier. The confusion, if any, is brief.

Furthermore, neither the sponsored link nor the linked Cannon & Dunphy, S.C. website carries the names of either plaintiff within their texts. As discussed earlier, the "Habush" or "Rottier" names do appear near the sponsored link; however, there is nothing on the link indicating endorsement of the defendants by the plaintiffs in any way.

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d) Internet Advertising Developments

The Internet is a developing venue.¹² Google, Yahoo!, and Bing change their protocols and adjust their algorithms as technology advances. In their brief in response to plaintiffs' motion for summary judgment, defendants point out that:

Google—on its own—now offers Internet users the “Pages similar” and “Something different” features which, in the search results, list the competitors of the business names that the user typed in the search box. For example, a search of “Habush” on Google automatically produces the links to four of the Habush firm’s competitors

Pages similar to www.habush.com

[Milwaukee Personal Injury Attorney](#) - Specializing in truck, ... - murphyprachthaus.com
[Warshafsky](#) - Get a free consultation with an experienced personal ... - warshafsky.com
[Domnitz & Skemp](#) - Contact the Milwaukee personal injury lawyers ... - domnitzlaw.com
[Cannon & Dunphy](#) - Cannon & Dunphy lawyers are some of ... - cannon-dunphy.com

Plaintiffs seek an injunction prohibiting the use of their names as key words that return defendants' sponsored link in search engines. This seems simple enough. However, the Internet and the search engine algorithms are constantly changing. If a sponsored link is enjoined, what about a box ad on the right column of the page? Or one on the left column? Or one in the middle of the search results? If the ad is set-off obviously as advertising, regardless of placement, is it allowable? If Google is popping up competitor names on its own, may a purchaser get a top spot in the list of generically returned competitors? What if the defendants would change the sponsored link text to simply say:

“An Alternative to Habush” or
“Another Choice for Personal Injury Lawyers”?

The moving-target nature of the competitive landscape is not a reason for courts to avoid the issue. It is, however, a factor in analyzing the reasonableness of defendants' conduct.

¹² Affidavit of Ross Fishman, November 30, 2010, pp. 11–20.

Analysis of Issues

Elements of Plaintiffs' Claim

Unreasonably

e) Business Practices and Attorney Ethics

Plaintiffs' have brought one claim in this litigation, that being that defendants used their names in violation of their rights of publicity. There is no claim of trademark infringement or unfair competition, beyond the claim under Wis. Stat. § 995.50. Although the circuit court is not the forum for claimed violations of the Rules of Professional Conduct for Attorneys, the ethics of defendants' conduct is a factor in judging its reasonableness.

The plaintiffs in this case have presented the opinions of scholars that defendants' conduct is ethically questionable. However, they have been unable to find any decision of a regulatory or adjudicative body to this effect. As might be expected, defendants have their own experts who say that defendants' practice violates no ethical or regulatory rule whatsoever.

The time may come when a legislature, regulatory board, or supreme court determines that the conduct at issue in this case is deceptive and misleading and therefore improper. But no such body has yet drawn this conclusion. Considering the analysis in the preceding sections of this decision, the trend may be toward increased freedom and reduced regulation or restriction.

In the absence of any clear prior determination that defendants' actions are unethical, there is no support for plaintiffs' argument that the principles of attorney conduct make them unreasonable.

Analysis of Issues

Elements of Plaintiffs' Claim

Unreasonably

f) The Balance of Reasonableness

Undisputed facts on the question of whether plaintiffs can meet their burden to show the defendants *unreasonably* used their names include the following:

1. Plaintiffs are both principles of a multi-attorney law firm that engages in advertising and public relations to promote the firm as a whole. The name of each plaintiff is included in the firm name.
2. A competitor purchases a sponsored link for the top position above generic results for searches on the name of either plaintiff in Internet search engines, which places defendants' promotional text in a location above all other links.
3. The sponsored link looks similar to generic results (with slight shading and/or ambiguous language to suggest that this is not a generic response to the requested search).
4. The text of the sponsored link does not contain the name of either plaintiff, although plaintiffs' names are shown nearby.
5. The web pages that appear in response to a click on the sponsored link do not contain the name of either plaintiff.
6. Nothing the defendants purchased or published indicates any affirmative endorsement by either plaintiff of the defendants' services.

The facts set forth above must be balanced against the historic, technological, and cultural factors discussed in this section. These include the importance and general methods of competition, the integration of plaintiffs' names with the larger firm, the developing nature of the Internet, and an appropriate respect for the intelligence of Internet searchers. As stated above, the term "unreasonable" means irrational, lacking a rational basis, not guided by reason, or capricious.

Under the circumstances of this case, no plaintiff can establish that his or her name was unreasonably used by the competitor.

D. Conclusion

Plaintiffs have established that defendants used their names without consent for purposes of advertising and trade. However, they cannot establish that such use was done unreasonably. There are no genuine issues of material fact for determination at a trial. Because only one of the two essential elements of the plaintiffs' claim is provable, defendants are entitled to summary judgment in their favor.

Plaintiffs' motion for summary judgment is denied. Defendants' motion for summary judgment is granted.

There is no further matter for resolution by this court. Therefore, this case is ordered dismissed.

Dated this 8th day of June, 2011.

BY THE COURT:

Charles F. Kahn, Jr.
Circuit Court Judge