

IN THE SUPREME COURT OF MISSOURI

JOHN DOE (TONY TWIST),)
)
 Appellant,)
)
 vs.) Supreme Court No. SC84856
)
 TCI CABLEVISION, etc., et al.,)
)
 Respondents.)

APPEAL FROM THE CIRCUIT COURT OF
CITY OF ST. LOUIS
STATE OF MISSOURI

HONORABLE ROBERT H. DIERKER
CIRCUIT JUDGE
DIVISION 3

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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CORRECTION OF RESPONDENTS' STATEMENT OF FACTS

Respondents' Brief at 12 says Respondents will correct certain factual misstatements in Appellant's Brief, but do not identify factual misstatements in Appellant's Brief, and state the facts in a light most favorable to Respondents, contrary to the Rule.

Respondents identify each Respondent at pages 12-14, but fail to state that McFarlane was an owner of and was president or CEO of all the entity Respondents.

At page 12 of Respondents' Brief they understate Appellant's activity in endorsing products, by saying he had been "paid to endorse certain St. Louis commercial products." Appellant has set forth the full endorsement activity of Appellant at page 10 and pages 17-19 of Appellant's Brief.

At page 14 Respondents characterize "Tony Twist" as a "minor character" in Spawn. McFarlane said the character Tony Twist was a major player in Spawn and the HBO series. (Tr. 778-779). The character "Twist" was a major player in Spawn. (Beatty, 81). McFarlane said the name "Tony Twist" was the key name. (Tr. 655).

At page 17 and 19 of Respondents' Brief they refer to a so-called disclaimer in Spawn: McFarlane admitted that the names he gave to certain characters in Spawn and in the HBO series were the names of existing famous hockey players and not coincidental. (Tr. 824, 825).

At page 17 of Respondents' Brief Respondents say Beatty's Wizard article was just Beatty offering his perspective on Mr. McFarlane's method for naming characters. Beatty directly testified that the information in his articles came from his interview with McFarlane, and no one else gave him any input. (Beatty, 15). The evidence on this matter is stated in Appellant's Brief, page 24-25.

At page 18 Respondents say that Appellant never received an endorsement deal based on gross

revenues of the company whose product he endorsed. The evidence showed there were endorsement contracts wherein the athlete received a percentage of the revenues, e.g., Carl Malone (up to 25% of gross for a comic book) (Arceneaux, 28-29, 32-33 and 47-48; Till, Tr. 138-141 and 144-147); the NHLPA contracted with a publisher to publish a comic book about hockey, featuring Appellant as one of only 16 hockey players. The compensation to the NHLPA was nine percent (9%) of revenues with a guarantee of \$60,000.00. (Tr. 394-395).

Examples given by Respondents at Respondents' Brief, page 27-29, about various celebrities cite no cases, but admits they were all publications about the particular celebrity and were directly related to the person. They were not an unrelated product, and therefore *New York Times v. Sullivan* would apply. Respondents state at page 29 that state and federal decisions since *New York Times v. Sullivan*, render Appellant's claim non-actionable as a matter of law. The United States Supreme Court has affirmatively stated that the actual malice requirements of *New York Times v. Sullivan* are not applicable to a right of publicity case. *Zacchini v. Scripps Howard Broadcasting Company*, 433 U.S. 562, 574 and 579 (1977); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

ARGUMENT

OBSERVATIONS

Having studied Respondents' Brief, the following observations are appropriate with respect to some issues in this case:

1. Respondents' Brief does not claim the Appellate Court was correct in holding that the Spawn comic itself had to be "of and concerning" Appellant, which was the core basis for the Appellate Court's decision. (Mo. App. E.D. App. A.42 and 69), and have thereby abandoned the "of and

concerning” argument.

2. Respondents’ Brief does not claim that the trial court’s holding that a right of publicity claim requires Respondents have the specific intent to use Appellant’s name for their benefit and concomitantly intended to injure Plaintiff’s marketability of his name was correct, and have abandoned that argument.

3. Respondents’ Brief does not argue the numerous erroneous findings made by the trial court and addressed in Appellant’s Brief were supported by the evidence.

4. Although Respondents’ Brief cites numerous defamation cases against media Defendants, such as *New York Times v. Sullivan*, nowhere do Respondents directly contend that the “actual malice” standard of defamation cases is applicable to this case. Respondents cite no cases, and there are none, that hold where a celebrity’s name and identity was used by a Defendant to promote a product unrelated to the Plaintiff, that that use of Plaintiff’s name and identity is protected under the First Amendment.

I.

APPELLANT MADE A SUBMISSIBLE CASE. (Replies to Respondents’ Point I and subpoints A, B and D - Respondents’ Brief page 30).

Respondents’ Brief at page 30-33 asserts Appellant failed to introduce evidence that Respondents used Appellant’s name as a symbol of his identity, principally relying upon *Nemani v. St. Louis University*, 33 S.W.3d 184 (Mo. banc 2000), when it held that a Plaintiff must produce evidence that a Defendant used Plaintiff’s name as a symbol of his identity and not just a mere name. Respondents are simply wrong.

Respondents admit that they used **this** Appellant’s name as the name of the comic character. (Respondents’ Brief, page 12). Respondents admit that the name used in *Spawn* was actually that of the

Quebec hockey player, Tony Twist at page 16. Even the trial court found that Defendant McFarlane originally and intentionally used the name of this plaintiff as the name of the character in the “Spawn.” (App. A.7-8).¹ The evidence on this issue is in Appellant’s Brief at pages 11-13, and 21-26. And after doing that, Respondents identified Appellant by name and profession in McFarlane’s letters column and in Wizard.

Cases cited by Respondents in support of First Amendment claim are not supportive of Respondents.

Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994); *Guglielmi v. Spelling-Goldberg Productions*, 603 P.2d 454 (Ca. 1979); and *Meeropal v. Nizer*, 560 F.2d 1061 (2nd Cir. 1977), cited by Respondents were all biographies, stories and commentaries about certain people or events, and therefore that is protected under the First Amendment and, because that use is protected, so are the advertisements for the publication. They are not cases where a celebrity’s name was used to the user’s advantage in promoting a **collateral** or unrelated product, as here. This exception is noted in *Guglielmi, supra*, at 603 F.2d at 457, fn 6, as a use that is not protected.

Newton v. Thomason, 22 F.3d 1455 (9th Cir. 1994); *Flip Side v. Chicago Tribune*, 564 N.E.2d 1244 (Ill. App. 1990); and *Polydoros v. Twentieth Century Fox*, 67 Cal. Rptr. 2d 305 (Cal. App. 1997), were all works of fiction in which the only thing used was the Plaintiff’s name. None of the Defendants used any Plaintiff’s name and identified profession to promote the product, as Respondents did

¹ We will refer to the Appendix to Appellant’s Substitute Brief as (App. A. __) and to Respondents’ Appendix as (Resp. A. ____), in order to distinguish between the two.

here. And in *Newton*, Plaintiff consented to the use. *Newton* at 1461. They are not on point.

Food Lion v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999), is cited for the same proposition for which *Falwell, supra*, was cited. *Food Lion* knew if it sued for defamation it would have to prove the Defendant made a false statement and acted with malice, which Food Lion knew it could not do. So, *Food Lion* alleged fraud, breach of loyalty, duty, trespass, etc., but sought to recover **defamation** damages. Right of publicity was not involved and *Food Lion* is not on point.

ETW v. Jireh Publishing, 99 F.Supp.2d 829 (N.D. Ohio 2000), cited by Respondents held the art print entitled “The Masters of Augusta” depicting Tiger Woods’ swing was not an infringement use of trademark, and a newsletter advertising the print, “is not the poster which is at issue in the case.” *ETW* at 835. *ETW*, interpreting *Zacchini* also said, apropos this case, that said *Zacchini* held, “One who appropriates to his own use and benefit the name or likeness of another is subject to liability to the other for invasion of privacy, and the use or benefit need not necessarily be commercial.” *ETW* at 834. *ETW* does not aid Respondents.

Cardtoons v. Major League Baseball Players Assn., 95 F.3d 959 (10th Cir. 1996), cited by Respondents, simply held that Cardtoon’s trading cards receive full First Amendment protections because they provide a social commentary or parody on public figures, major league baseball players. *Cardtoons*, 95 F.3d at 969.

The parties agree that the Spawn comic is not a commentary or a parody on Appellant or hockey. *Cardtoons* does not aid Respondents.

And finally, in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), regarding right of publicity, the Court said, “Viewed in context, the article as a whole is a combination of fashion,

photography, humor and **visual** and **verbal editorial** comment on classic films and famous actors.” *Hoffman*, 255 F.3d at 1185. (Emphasis added). Therefore, the publication had First Amendment protection because the publication was “visual and verbal editorial comment.” *Hoffman* does not aid Respondents.

In the instant case, Respondents admit, and the evidence shows, that Respondents intentionally used Appellant’s name as the name of the comic character, **and** then Respondents identified Appellant by name and professional identity in McFarlane’s letters column, and provided the information to Beatty about Appellant, which he knew would be published, promoting their product Spawn to their targeted audience - hockey fans.

Respondents knowingly utilized **this** Appellant’s name and his professional identity to their advantage.

B.

THE DISMISSAL OF COUNT II FOR DEFAMATION HAD NO EFFECT ON COUNT I- NAME APPROPRIATION. (Replies to Respondents’ Point B at Respondents’ Brief, page 33).

Appellant’s decision not to appeal the order dismissing Count II - defamation - has no effect on Count I - right of publicity, and Respondents waived this argument by failing to raise it prior to trial, at trial or in their post-trial motions.

Nevertheless, the point has no merit. In that same order of March 4, 1999 (L.F. 1000), the Court denied Respondents’ Motion to Dismiss Count I for wrongful appropriation of his name. The Court dismissed Count II because the Court found the Spawn comic could not reasonably be seen as ascribing

to Appellant the unlawful and deviant activities of the fictional character, and therefore could not be libelous. (L.F. 1006).

The Court did not address the **use** Defendants were making of Appellant's name and identity to market Spawn and Spawn products, and addressed only defamation count elements and not the misappropriation of name count.

Respondents' point has no merit.

C.

Respondents' quotation from Appellant's testimony at 35 shows on its face that Appellant did not admit Respondents did not use his identity.

D.

**RESPONDENTS' USE OF APPELLANT'S NAME AND IDENTITY
IN PROMOTING SPAWN AND SPAWN PRODUCTS VIOLATED
APPELLANT'S RIGHT OF PUBLICITY AND IS NOT
PROTECTED BY THE U.S. CONSTITUTION. (Replies to Point D
of Respondents' Brief, page 36).**

Respondents have always denied that "Spawn" was a parody or commentary on hockey or a parody on some sort on Appellant.

If Spawn was a parody, criticism, or commentary about Appellant or Appellant's hockey career, then it would in all likelihood be "of and concerning" Appellant, and perhaps would be the basis for a defamation (libel) suit, but such a suit would come under the strictures of *New York Times v. Sullivan*, 376 U.S. 254 (1964) requiring actual malice. In such a defamation suit, if Spawn was "of and concerning"

him it would also be within the purview of *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) and *Cardtoons v. Major League Baseball Player's Association*, 95 F.3d 959 (10th Cir. 1996), but that is admittedly not the case here, as *Spawn* was not about Appellant.

This is not a libel action or a defamation suit. It is a right of publicity claim which *Zacchini v. Scripps Howard*, 433 U.S. 562 (1977) and *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) held is not protected by the First Amendment, and that the actual malice standard does not apply to this tort.

Respondents point should be overruled.

II.

**RESPONDENTS' USE OF APPELLANT'S NAME AND
IDENTITY IS NOT PROTECTED BY THE FIRST
AMENDMENT. (Replies to Respondents' Brief, Point II, A,
B & C, Respondents' Brief, page 37).**

Respondents waived reliance upon Article I, Section VIII of the Missouri Constitution in Point II because they did not raise it in their Motion for Directed Verdict at the close of all of the evidence. (L.F. 1222-1223; 1224-1225; 1227-1236), nor at any time at trial. Respondents have therefore waived their right to assert it here. *Hatch v. V.P. Fair Foundation*, 990 S.W.2d 126, 137 (Mo. App. E.D. 1999); *Letz v. Turbomeca*, 975 S.W.2d 155, 163 (Mo. App. W.D. 1997); Rule 72.01(a)(b). Further, Respondents make no argument under the Missouri Constitution, nor do they cite any Missouri case in support.

A.

**RESPONDENTS INCORRECTLY ASSERT THAT
APPELLANT ARGUES THAT COMIC BOOKS HAVE NO
MORE FIRST AMENDMENT PROTECTION THAN DOES
A PORTABLE TOILET. (Replies to Respondents' Brief
Point II(A), page 38).**

Appellant makes no such contention. Nor does Appellant attempt to reinterpret *New York Times v. Sullivan*, 376 U.S. 254 (1964). The United States Supreme Court has already pointedly interpreted *New York Times v. Sullivan*, *supra*, a defamation action requiring a showing of actual malice, to not

be applicable to a right of publicity case. *Zacchini v. Scripps Howard Broadcasting Company*, 433 U.S. 562, took pains to distinguish First Amendment protection afforded publications in defamation actions from right of publicity cases, holding First Amendment protections in *New York Times v. Sullivan* do not apply to right of publicity cases. *Id.* at 574. That holding was reaffirmed in *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), a defamation case, in holding that the “actual malice” standard does not apply to a right of publicity claim. *Id.* at 52. Respondents say *Zacchini, supra*, was a “statutory claim for appropriation.” That is incorrect. *Zacchini* was a common law right of publicity case, *Zacchini v. Scripps Howard*, 351 N.E.2d 224, 456, 458 (Ohio 1976), the same as in the instant case.

Appellant has briefed this point in Appellant’s Brief under Point I, pages 55-70.

Respondents attempt to make some distinction between the liability elements of the torts of “misappropriation of name” and “right of publicity.” The Court of Appeals opinion, citing the treatise on these torts, said the liability elements of both are essentially the same and they differ only on damages. (App. A.51).

Respondents’ argument is based on the incorrect assumption that the Respondents only used the name Tony Twist as the name of the fictional character in Spawn.

T.J. Hooker v. Columbia Pictures, 551 F.Supp. 1060 (N.D. Ill. 1982), citing Prosser Law of Torts noted that a person can use any name he likes in fictional work, but the tort occurs when the Defendant makes use of that name to pirate the Plaintiff’s identity for some advantage of his own. *Accord; Nemani, supra; Haith, supra* and *Munden v. Harris, supra*.

Here Respondents enlarged upon the use of Appellant’s name and utilized Appellant’s professional

identity in promotional material to promote the product - Spawn - that was wholly unrelated to Appellant. *Hooker* and *Newton* support Appellant and do not aid Respondents.

We addressed the cases cited here by Respondents earlier in this Brief. Respondents cite *Cardtoons, supra*, to persuade that a right of publicity case is not a property right case. *Cardtoons* did not so hold. Further, that concept is refuted by *Munden v. Harris*, 134 S.W. 1076 (Mo. App. 1911); *Haith v. Model Cities Health Corporation*, 704 S.W.2d 684 (Mo. App. W.D. 1986); *Nemani v. St. Louis University*, 33 S.W.2d 184 (Mo. banc 2000), and *Zacchini v. Scripps Howard*, 433 U.S. 562 (1977) and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

However, *Cardtoons* reaffirmed that the right of publicity involves a cognizable property interest, citing *Zacchini v. Scripps Howard Broadcasting Company, supra. Id.* at 967. Significantly, the *Cardtoons* Court noted that the cards were not commercial speech because “they do not merely advertise another unrelated product.” *Id.* at 970. “Spawn” is “the unrelated product” spoken of in *Cardtoons*.

The use of Plaintiff’s name and professional identity by Respondents in McFarlane’s letters column and Wizard was not fiction and was not part of Respondents’ comic strip - Spawn. The testimony of McFarlane and others established that much of their marketing efforts were directed at hockey fans. We have set that evidence out in the Substitute Brief. It begs credulity to suggest that the use of Appellant’s name and identity in their letters column, and in Wizard magazine, was for any purpose other than to promote the marketing of Spawn by connecting Appellant and his hockey fame identity to Spawn in the minds of the hockey fans and others. McFarlane did not deny his replies to fans was a “promotion.” He just said, “I don’t know if you want to call it a promotion. (Tr. 683).

Hoffman, supra pointed out, the use of a celebrity's identity for the purpose of selling a product does not implicate the First Amendment protection of expressions of editorial opinion. *Id.* at 1185.

Respondents argue that the use of Appellant's name in *Spawn* was not a commercial use citing Restatement (Third) of Unfair Competition, Section 46 (1995) and *Newton v. Thomason, supra*, by centering solely on the use of the name "Tony Twist" for the name of the character in the comic *Spawn* itself. They choose to ignore the explicit use of Plaintiff's name and professional identity in McFarlane's letters column and in *Wizard*.

In this case, Respondents used their own publication in McFarlane's letters column and the *Wizard* publication to accomplish the result of promoting the *Spawn* comic and products.

Black's Law Dictionary (7th Ed., 1999, page 55) defines "advertising" as "drawing the public's attention to something to promote its sale."

The evidence was sufficient to show that the Respondents utilized Plaintiff's name and professional identity in Respondents' letters column and in *Wizard* in order to draw hockey fans and the public's attention to *Spawn* and *Spawn* products to promote their sale - an advantage.

In the Restatement of Law of Unfair Competition (Third), Section 47 entitled "Use for Purposes of Trade" comment (a) provides:

Use and Advertising. The use of a person's identity for the purpose of advertising goods or services marketed by the user is a use "for purposes of trade" under the rules stated in section 46 ***. Thus the unauthorized use of another's name or likeness in newspaper *****or in other solicitation of prospective customers will ordinarily subject**

**the user to liability for infringement of the other's right of
publicity***.**

In subparagraph (c) of said Restatement it is stated:

However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising.

The above is consistent with *Hoffman, supra* - the use of a Plaintiff's name and identity to promote an unrelated product is actionable. In *Tellado v. Time Life Books, Inc.*, 643 F.Supp. 904 (U.S.D.C. N.J. 1986) the Defendants used Plaintiff's photo on a publisher's letter seeking responses to Defendant's book - "Vietnam Experience" - which was not about the Plaintiff. The Court said the photo was not in the book that, "it is important to remember here that defendant used plaintiff's photograph solely to hype its product. Plaintiff should be permitted to seek compensation for this use." *Id.* at 914. The *Tellado* court cited *Zacchini v. Scripps Howard Broadcasting Company, supra*, saying that the broad language of the Court's opinion [*Zacchini*] applies to *Tellado's* claim ***. *Id.* at 913. The Court's holding in *Tellado, supra*, recognizes that the publication was a product unrelated to the Plaintiff's, as the Spawn comic here, and therefore the use of the photo to promote the product was compensable.

Respondents cited *William O'Neil and Company, Inc. v. Validea.com, Inc.*, 202 F.Supp.2d 1113 (C.D. Cal. 2002), saying that if a Defendant publishes material that is protected by the First Amendment, he or she cannot be liable for truthful advertisements of the material. *O'Neil* involved a book about the investment strategies of well known analysts, including O'Neil. The opinion in the case notes that

O'Neil's basic complaint was that the book contained various misstatements and mischaracterizations concerning the Plaintiff's work as a securities analyst. Therefore, the Court analyzed the case under *New York Times v. Sullivan, supra*, and held that the book itself, being about the Plaintiff, was entitled to First Amendment protection.

Here, the Spawn comic was not about Appellant. *O'Neil* does not aid Respondents.

Neither the treatises on name appropriation and right of publicity, nor any of the cases cited by Respondent hold that a Defendant can utilize the name and identity of another to promote a product, wholly unrelated to the Plaintiff, and avoid liability simply on the basis that one of the uses made of the Plaintiff's name was for a fictional character in the publication.

If Respondents' suggestions were the law, a publisher could routinely avoid any liability in a right of publicity case by simply giving a fictional character the same name as a Plaintiff in a publication wholly unrelated to the Plaintiff; then utilize the Plaintiff's celebrity name and professional identity to promote or market the product, and truthfully admit they were doing that. No case so holds, and that is simply not the law. It seems obvious that if that were the law, there could be no cause of action for misappropriation of name or right of publicity.

Respondents seek to excuse McFarlane's response simply being a "truthful response." Appellant has addressed that issue at pages 67 and 68 of Appellant's Brief. No case, nor any treatise on the subject, holds or suggests that a Defendant may escape liability for the use of another's name and identity by simply admitting that the Defendant did exactly that.

The issue is not whether McFarlane was truthful in his response, or in the information given to Wizard, but rather whether Respondents utilized Plaintiff's name and professional identity to their advantage

in promoting Spawn. Respondents offered no evidence as to why Respondents utilized Appellant's name and identity. Given McFarlane's avid interest in hockey; his practice of naming characters after famous hockey players; the marketing of Spawn at the Detroit Whalers game; Respondents' efforts to have a Spawn night at the Phoenix Coyotes hockey game; the marketing of hockey pucks with the Spawn logo; sponsorship of a junior league hockey team wearing jerseys with the Spawn logo; the marketing of toy Zamboni machines with the Spawn logo, coupled up with McFarlane's statement that everything he does is to make Spawn more marketable, and the use of Appellant's name as the character, plus the identification of Plaintiff by name and hockey fame is sufficient for the jury to find that Respondents' use of Appellant's name and identity was to gain an advantage - to promote the marketing of Spawn and related products.

C.

APPELLANT'S CLAIM FOR INVASION OF HIS RIGHT OF PUBLICITY WAS NOT A SUBTERFUGE TO CIRCUMVENT THE ACTUAL MALICE REQUIREMENT OF *NEW YORK TIMES* v. *SULLIVAN*. (Replies to Respondents' subpoint C of Respondents' Brief, page 49).

New York Times v. Sullivan, supra, was a libel - defamation - suit and did not involve right of publicity. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), was a defamation suit, not a right of publicity case. Respondents say *Falwell, supra*, holds the First Amendment requires non-reputational claim against a publisher be governed by the same standard governing libel claims. *Falwell, supra*, did not say or hold that. *Falwell* was specific in holding that, "public figures and public officials may not

recover for the **tort of intentional infliction of emotional distress**...without showing *** actual malice,...” and applied the *Sullivan* standard. *Id.* at 56. *Falwell* was specific in holding that the actual malice standard does not apply to the tort of appropriation of a right of publicity. *Id.* at 52.

Appellant addressed *Food Lion, Inc. v. Capital Cities ABC, Inc.*, *supra*, under Point I of this Brief. It does not aid Respondents.

The Respondents’ statement from *Meeropal v. Nizer*, 560 F.2d 1061, 1066 (2nd Cir. 1977), that “the same standards of constitutional protection apply to an invasion of privacy as to libel claims” is completely out of context. *Meeropal* was referring to one of the first three privacy actions, defamation claims, and not the fourth cause of action - misappropriation of name or right of publicity - a property right claim. Additionally, *Zacchini*, *supra*, directly held that a right of publicity case was not subject to the actual malice standard of *New York Times v. Sullivan*. And *Hustler Magazine v. Falwell*, *supra*, decided some ten years after *Meeropal*, confirmed that the actual malice standard does not apply to this tort.

Respondents’ recitation of the allegation in Appellant’s Amended Petition are of no moment, as the jury never saw the pleadings and the trial court limited the evidence and the submission to the jury to right of publicity only. The Court excluded all evidence relating to defamation damages.

Respondents cite *Flip Side, Inc.*, *supra*, and we have distinguished it *infra*. *Flip Side* was a defamation case. The *Flip Side* Court held: “we conclude that since the publication that is involved here cannot be reasonably understood as describing actual facts about the Plaintiffs, it is not defamation as a matter of law.” *Id.* at 656-657. Right of publicity was not involved.

Respondents’ point should be overruled.

III.

**RESPONDENTS' COMMERCE CLAUSE POINT IS NOT
REVIEWABLE. (Replies to Respondents' Brief Point III at
Respondents' Brief, page 52).**

Under Point III Respondents, for the first time, raise the Commerce Clause of the U.S. Constitution, and therefore have waived it, and cannot assert it on this appeal. *Barnes v. Anchor Temple Assn.*, 369 S.W.2d 192, 194 (Mo. 1963); *Massage Therapy Training v. Mo. State Bd.*, 65 S.W.3d 601, 608 [14-16] (Mo. App. S.D. 2002).

IV.

THERE WAS EVIDENCE OF ADVANTAGE TO RESPONDENTS AND HARM TO APPELLANT IN USING APPELLANT'S NAME AND IDENTITY. (Replies to Point IV of Respondents' Brief at Respondents' Brief, page 53.)

Appellant has summarized the evidence with respect to damages and the advantage to Respondents in using Appellant's name and identity in the marketing of Spawn and Spawn products, and the harm to the Appellant, at pages 28 to 38 of Appellant's Brief, and briefed the point under Point I(B) of Appellant's Brief, page 73-90.

At the hearing on Respondents' post-trial motions with respect to the verdict the trial court said, **"well you know it is supported by the evidence, ***."** (Appellant's Brief, page 38; Tr. 1244). Appellant lost a \$100,000.00 per year endorsement contract because of Appellant's name being associated with Spawn. (Appellant's Brief, page 33-34; Phillips, 14).

Respondents' comment on Image Comics, McFarlane Entertainment and McFarlane Toys at page 54-55 of Respondents' Brief. Appellant has briefed the part played by each of these Respondents in Appellant's Brief, pages 19-27.

McFarlane admitted his intent in using the comic books with Tony Twist's name in them was to promote the sale of the toys and to add value to them. (Appellant's Brief, page 31; Tr. 762).

The evidentiary facts on this matter are fully set out in Appellant's Statement of Facts and Summary of Evidence, and briefed at page 73-90 of Appellant's Brief.

Respondents' point should be overruled.

V.

THE ORDER GRANTING A NEW TRIAL SHOULD BE REVERSED. (Replies to Respondents' Point V and subpoints A, B, C and D of Respondents' Brief, page 58).

The order granting a new trial as against the weight of the evidence should be reversed.

Appellant briefed that point under Point II(F) at page 125-127 of Appellant's Brief. That order was premised on the trial court's belief that Plaintiff failed to make a submissible case and as such, under *Lifritz v. Sears Roebuck and Company*, 472 S.W.2d 28, 32-33 (Mo. App. E.D. 1971), and *McDowell v. Kawasaki*, 799 S.W.2d 854, 858-861 (Mo. App. 1990) was not a discretionary ruling. Additionally, the trial court's finding that the evidence failed to show that Respondents were benefitted or that Plaintiff was injured is based upon the repetitive incorrect statements of the evidence made by the trial court. See Appellant's Brief, Point II(E) at page 109.

When a trial court recites its recollection of evidence in the case and where those assertions are directly refuted by the record, the conclusions reached by a trial court based upon erroneous statements of evidence cannot stand.

Respondents' point should be overruled.

B.

THE JURY VERDICT WAS BASED ON COMPETENT AND ADMISSIBLE EXPERT TESTIMONY AND OTHER TESTIMONY. (Replies to Point V(B) of Respondents' Brief, page 60).

Appellant has briefed this point under Point II(E) in Appellant's Brief beginning at page 109, and has demonstrated that Appellant's experts, Dr. Till and Mr. Arceneaux, were competent qualified experts in the field of the market value of the use of an athlete celebrity's name and identity to the user. The trial court said they "qualified as experts" in its final judgment (App. A.18), but simply asserted that it did not believe them. However, the believability of the expert witness is the exclusive province of the jury. (*Waters v. Bankers Life Assurance Association*, 50 S.W.2d 183, 188 (Mo. App. W.D. 1932); Appellant's Brief, page 111).

The jury verdict was based on competent and admissible expert testimony, and the Respondents' point should be overruled.

C.

GRANT OF A NEW TRIAL SHOULD BE REVERSED BECAUSE THE JURY WERE PROPERLY INSTRUCTED TO HOLD EACH DEFENDANT JOINTLY AND SEVERALLY LIABLE FOR DAMAGES. (Replies to Respondents' Point V(C) and (D) at page 65 of Respondents' Brief).

Appellant addressed this issue in Point II(C) and (D) of Appellant's Brief at pages 102-109.

Respondents' argument that Plaintiff is attempting to pierce the corporate veil of these corporate entities is not correct. Each corporate Defendant participated in the singular enterprise that McFarlane controlled. These Defendants acted to take their part in the production of Spawn, and Spawn related products, under the direction and authority of McFarlane. McFarlane's knowledge, as President or CEO, was the knowledge of each entity. As a consequence of all Respondents' tortious conduct there was one indivisible injury to the Appellant, and that was the market value of Respondents' use of his name and identity to promote their products.

If any Respondent wanted to get proportional fault determined, it was available under *Missouri Pacific Railroad Company v. Whitehead and Kales*, 566 S.W.2d 466 (Mo. banc 1978), which held a Defendant could file a third party claim or, maintain a separate action for the determination of the relative part of responsibility and damage to the Plaintiff, but that would not impair Plaintiff's right to have a joint and several verdict against Defendants found liable. *Id.* at 474.

Gustafson v. Benda, 661 S.W.2d 11 (Mo. banc 1983) abolished contributory negligence or fault, and held comparative fault would apply in Missouri, and held the opinion did not impair joint and several liability, saying:

By this opinion we do not intend to impair the existing right of a claimant to recover the total amount of his judgment against any defendant who is liable.

Id. at 16.

Respondents failed to seek an apportionment of fault, but could still do so.

Respondents are incorrect when they argue that the Court should have instructed the jury to award damages based specifically on the benefit derived by each Defendant from that Defendants' own conduct. That is not the measure of damages for this tort.

The jury was correctly instructed. The Order granting a new trial should be reversed.

D.

**PLAINTIFF'S VERDICT DIRECTING INSTRUCTIONS
PROPERLY INSTRUCTED THE JURY ON THE
ELEMENTS OF PLAINTIFF'S RIGHT OF PUBLICITY
CLAIM. (Replies to Point V(D) of Respondents' Brief, page
69).**

Appellant has briefed this point under Point II(A) beginning at page 97 of Appellant's Brief. Under that point, Appellant addressed the reasons given by the trial court in holding Plaintiff's verdict directing instruction were incorrect, and we believe have shown that the trial court erred in that regard, and the instruction was correct.

At page 69-70 of Respondents' Brief, Respondent now asserts that Appellant's Instructions 6, 8, 10, 12 and 14, verdict directing instructions, were erroneous for failure of the instruction to require a finding that Respondents used Appellant's name as a symbol of Appellant's identity, and that Respondents used Appellant's name in commercial speech, or acted with actual malice in using his name in non-commercial speech.

Respondents did not make the specific objections regarding commercial or non-commercial speech at the instruction conference at trial (Tr. 1115-1117), and cannot raise them now. (Rule 70.03).

McFarlane Defendants objected to Verdict Form A because it did not require the jury to break out any amounts of damages against the various Defendants, and no requirement that the verdict form designate how much damage, if any, was caused by each separate Defendant. However, Respondents did not object to Instruction No. 16, which was the damage instruction and authorized a single amount as damages as to Defendants the jury found to be liable. (App. A..77).

Having made no objection whatever to the damage Instruction No. 16 during the instruction conference at trial, (L.F. 1110-1118), Respondents cannot complain on appeal. Instruction 16 authorized the jury to return one amount as to all of the Defendants the jury found liable. The verdict form merely followed that instruction and provided the procedural form in which they could return their verdict, based upon the jury's findings under the instructions, and was in accordance with the substantive instructions. It was not an instruction submitting issues to the injury, and is not be read by the Court to the jury. (MAI 5th Ed., Verdict Form 36.01 at page 652).]

Having failed to object to damage Instruction 16, Respondents cannot now raise issues as to the verdict form.

Image Comics objected to the verdict directive against it, Instruction 14, on the basis that it was not based on an economic benefit derived by any one or more of the Defendants. That is not the measure of damages under the law. McFarlane Defendants then added to their objection that the evidence does not support a finding that an economic advantage was obtained by any Defendants in the case. (Tr. 1116, 1117).

Instruction 6 required findings in accordance with Missouri law. It required a finding that the Defendant intentionally used or published Plaintiff's name and derived an advantage from the use of

publication of Plaintiff's name, or Plaintiff suffered a harm as a result of the Defendants' use of publication of Plaintiff's name; that Plaintiff did not consent; and that as a direct result thereof Plaintiff sustained damage.

The trial court noted that verdict directing instructions were not MAI Instructions and said that the Court was giving it "premised on this Court's previous orders in *Haith v. Model Cities Health Corporation.*" (Tr. 1111).

Respondents' assertion that the instruction required only a finding that Defendants "used Plaintiff's name" is incorrect. The jury was also instructed that they had to find that Defendants derived advantage from the use or publication of Plaintiff's name or Plaintiff suffered harm as a result of that use, and that Plaintiff sustained damage. It submitted the elements of the claim as required by Missouri law.

In *Alcorn v. Union Pacific Railroad Company*, 50 S.W.3d 226 (Mo. banc 2001) the Defendant objected to a Plaintiff's verdict directing instruction on the basis that the instruction did not provide the jury with factual guidelines to determine whether the Defendant there acted negligently. The Court upheld the giving of the instruction saying:

The use of a MAI jury instruction, properly modified for a particular case, contemplates that the jury will be properly advised by the argument of counsel concerning details. *** Under the guidance of Rule 70.02(b), the trial court is to submit only ultimate factual issues to the jury, avoiding evidentiary details that might otherwise confuse the issues. *Koehler*, 573 S.W.2d at 944.

Id. at 240-241.

On April 10, 2000, about three months prior to trial of this case, the trial court issued an order setting out the elements necessary to establish a cause of action for wrongful appropriation of name as being: “(1) the publication/use of Plaintiff’s name or likeness, (2) the Defendants derived an advantage therefrom, and (3) the Plaintiff did not consent to the publication/use. *Haith v. Model Cities Health Corporation*, 704 S.W.2d 684 (Mo. App. W.D. 1986).” (L.F. 1088).

As noted *supra*, the trial court gave Plaintiff’s verdict directing instructions premised on the Court’s previous order in *Haith v. Model Cities Health Corporation*, and Appellant followed the Court’s orders.

Appellant’s verdict directing instructions submit the elements of this claim to the jury is in accordance with this Court’s decision in *Nemani v. St. Louis University, supra*, and the Court of Appeals’ decision in *Haith v. Model Cities, supra* and *Munden v. Harris, supra*.

Respondents’ point should be overruled.

V.(D)(2)

APPELLANT’S VERDICT INSTRUCTIONS WERE CORRECT BECAUSE THERE WAS EVIDENCE OF ADVANTAGE OF USING PLAINTIFF’S NAME. (REPLIES TO RESPONDENTS’ POINT V(D)(2) - RESPONDENTS’ BRIEF, PAGE 71).

Appellant briefed this point under Point II, B, C & D at pages 100-109, and summarized the evidence relating thereto at Appellant’s Brief, page 28-32, which shows evidence of advantage to Respondents.

The trial court’s recollection of the evidence in the case contained numerous errors, as pointed out in Appellant’s Brief at 80-90. During the post-trial motion arguments, the court acknowledged the verdict was supported by the evidence saying, “well you know, it’s supported by the evidence, ***.” (Tr. 1244). (Emphasis supplied). Further record evidence that Respondents received a pecuniary advantage from their intentional use of Appellant’s name is found in Appellant’s Brief beginning at page 74, 77 and 102.

Under this point, at page 72 of Respondents’ Brief, Respondents argue that the verdict was in an “astonishing amount.”

Respondents’ Motions for JNOV and for New Trial did not assert that the verdict of the jury was a result of bias and prejudice, but did assert that the verdict was excessive and sought a remittitur, which the trial court denied. (App. A.21).

The verdict was for a large sum of money. However, we doubt that this Court will see a case where it is made as abundantly clear, as here, that the jury diligently followed the instructions of the Court

and based their verdict directly upon the evidence in the case. That is demonstrated by the jury's notations on the verdict form as to how they arrived at the amount, and the amount was supported by the expert testimony given in the case from Dr. Till and Mr. Arceneaux. As noted above, even the trial court acknowledged that the verdict was supported by the evidence, (Tr. 1243-1244), and "was in keeping with the testimony." (App. A.18-19).

Respondents' point should be overruled.

VI.

**INJUNCTIVE RELIEF IS NOT PRIOR RESTRAINT
BECAUSE RESPONDENTS' CONDUCT HAS BEEN
JUDICIALLY DETERMINED TO BE TORTIOUS. (Replies
to Respondents' second Point V and subpoints A, B and C).**

Appellant has briefed this issue in Point III of Appellant's Brief beginning at page 128. It is not "prior restraint" to enjoin unlawful conduct after it has been judicially determined to be unlawful, citing cases.

VII.

THIS COURT MAY ORDER A REMITTITUR.

The jury verdict was for \$24,500,000.99. Respondents claimed the verdict was excessive and sought remittitur in the trial court. (L.F. 1299-1300).

During the argument on post-trial motions, Appellant argued the verdict was supported by the evidence, the trial court said, “Well, you know, it’s supported by the evidence,***.” (Tr. 1243, 1244). (Emphasis added).

The Court, in its final judgment, said “***, the jury’s verdict on its face shows calculations in keeping with the testimony about the percentage of gross revenues attributed to the value of plaintiff’s name.” (App. A.18-19), and overruled Respondents’ request for remittitur. (App. A.21).

Thus it is clear that the trial court acknowledged and held the verdict was supported by the evidence admitted at trial, and was not excessive under that evidence.

Appellant believes the verdict was appropriate under the evidence, but it is this Court’s view that controls.

Should this Court believe and find the amount of the verdict was somewhat excessive, then this Court has the authority to order a Plaintiff to remit in an amount this Court decides upon, and the Plaintiff must remit or face the trouble and expense of a new trial. *Midam v. Vestal*, 671 S.W.2d 448, 453 (Mo. App. 1984); *Letz v. Turbomeca*, 975 S.W.2d 155, 180 (Mo. App. W.D. 1997).

That discretion was exercised in *Letz v. Turbomeca Engine Corp.*, *supra*, when the Court ordered a remittitur of \$41 million, and affirmed the judgment for \$26.5 million in punitive damages as of the date of the judgment’s original entry. That affirmation was conditioned on the Plaintiff remitting the sum

of \$41 million within fifteen days of the Court's mandate in that case, or a new trial on damage only would be granted. *Id.* at 180.

Should this Court find the verdict was somewhat excessive, then Appellant suggests this Court order a remittitur of some amount of the verdict.

CONCLUSION

For the reasons set forth in Appellant's Brief and in this Reply Brief, Appellant respectfully requests that the Court reverse the trial court's judgment notwithstanding the verdict and grant of a new trial, and reinstate the jury's verdict, in whole or in part, and remand the equitable count for injunction to a different judge to decide the equitable issues on the injunctive count.

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Reply Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 7,557 words, as calculated by counsel's word processing program;
- (B) A copy of this Brief is on the attached 3 1/2" disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Appellant's Reply Brief were served this 27th day of January, 2003, addressed to the following:

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