

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BIDZIRK, LLC, DANIEL G. SCHMIDT,)
III, and JILL PATTERSON,)

Plaintiffs,)

v.)

PHILIP J. SMITH,)

Defendant.)

Civil Action No. 6:06-CV-00109-HMH

MOTION FOR JUDGMENT
ON THE PLEADINGS

COMES NOW Daniel G. Schmidt, III (“Schmidt”) and Jill Patterson (“Patterson”),
Plaintiffs in the above-captioned action, and pursuant to Fed. R. Civ. P. 12(c), file this their
motion for judgment on the pleadings, and show the Court as follows:

INTRODUCTION

Schmidt and Patterson filed their complaint on January 10, 2006, asserting claims for
trademark dilution, defamation and invasion of privacy. See Entry Number 1. Defendant failed
to answer and the clerk entered default. The Court after hearing set aside the default and ordered
Defendant to file a proper answer. Defendant filed his answer on March 2, 2006. See Entry
Number 19. In his answer Defendant admits certain conduct that renders him liable for
defamation and invasion of privacy, and the Court should accordingly enter judgment on the
pleadings.

ARGUMENT

“In ruling on a Rule 12(c) motion for judgment on the pleadings, the court must accept the nonmovant’s allegations as true; viewing the facts in the light most favorable to the nonmoving party. Judgment on the pleadings should be granted if the movant is entitled to judgment as a matter of law.” Okatie Hotel Group, LLC v. Amerisure Ins. Co., 2006 U.S. Dist. LEXIS 2980 at *4 (D.S.C. January 13, 2006) citing Moore’s Federal Practice § 12.38 (3d ed.).

In this case, Schmidt alleges that Defendant

Published statements on his blog that tended to impeach the honesty, integrity, virtue or reputation of Schmidt, which caused injury to him in his business or occupation. [Defendant’s] statements include, but are not limited to: (1) derogatory statements concerning Schmidt’s alleged impropriety or inadequacy in performing his trade or profession . . . [Defendant’s] statements are defamatory and actionable per se.

See Complaint, ¶ 22. Schmidt and Patterson also allege that Defendant misappropriated their likenesses in his internet blog, thereby tortiously invading Schmidt’s and Patterson’s privacy.

See Complaint, ¶¶ 29-33. Respecting this misappropriation, Schmidt and Patterson allege that Defendant’s

purpose in linking his blog to the aforementioned photograph was to imply that Schmidt and Patterson, by virtue of their then-pending marriage, were unable to dedicate themselves sufficiently to the operations and administration of BidZirk.

See Complaint, ¶ 30. In his answer, Defendant “accepts statement [sic] made in Paragraph 30 of this Complaint.” See Answer, ¶ 30.

By admitting that his purpose in misappropriating the images of Schmidt and Patterson was to slander their ability property to operate their business, Defendant simultaneously

establishes his liability for defamation and invasion of privacy. See, e.g., Moshtagi v. The Citadel, 443 S.E.2d 915 (S.C. Ct. App. 1994) (finding actionable statements implying inadequacy of plaintiff's job performance); S.C. Code § 15-75-10 (regarding implied incompetence in business or profession as negligence per se); see also Snakenberg v. Hartford Cas. Ins. Co., 383 S.E.2d 2 (S.C. Ct. App. 1989) (noting that “[w]rongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness or identity by the defendant for his own benefit”). Accordingly, the amount of damages is the only item left for proof, and entry of judgment as to liability on both counts is appropriate.

WHEREFORE, Plaintiffs pray that the Court grant their motion and enter judgment on the pleadings on their claims for defamation and invasion of privacy.

This 21st day of April, 2006.

/s/ Kevin M. Elwell

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing MOTION FOR JUDGMENT ON THE PLEADINGS by depositing same in the United States Mail in a properly-addressed envelope with adequate postage affixed to:

Mr. Philip J. Smith
601 Cleveland Street, Apartment 5-B
Greenville, South Carolina 29601

This 21st day of April, 2006.

/s/ Kevin M. Elwell

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