STATE OF MICHIGAN

COURT OF APPEALS

FRANCIS G. MURDICK, d/b/a MURDICK'S FUDGE, a/k/a FRAN MURDICK'S FUDGE,

Plaintiff-Appellant,

v

ROBERT J. BENSER and ORIGINAL MURDICK'S FUDGE COMPANY OF MACKINAC ISLAND, INC.,

Defendant-Appellee.

UNPUBLISHED
March 12, 2002

No. 227562
Cheboygan Circuit Court
LC No. 98-006502-CZ

Before: Gage, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order denying plaintiff's request to enjoin defendant from using the name "Murdick" in the name of his Mackinaw City fudge shop. We affirm.

Plaintiff's grandfather established the first Murdick candy shop on Mackinac Island in 1887. Defendant purchased the right to use the name "Original Murdick's Fudge of Mackinac Island" in 1969 and opened stores bearing that name on the island as well as in St. Ignace and on Martha's Vineyard, Massachusetts. In 1981, plaintiff became the first to open a fudge store under the Murdick name in Mackinaw City, and until 1997, plaintiff's "Fran Murdick's Fudge" remained the only Murdick fudge store in that city. In 1997, however, at the behest of the developer of a new mall, defendant opened his first Mackinaw City store, located close to plaintiff's establishment.

Alleging that defendant's use of the Murdick name in Mackinaw City constituted unfair competition by creating consumer confusion and deception, plaintiff brought suit for injunctive relief. Noting that plaintiff had shown only minimal confusion resulting from defendant's proximity and that plaintiff's sales had increased every year but 1997, the trial court denied the injunction based on a lack of evidence of purposeful deception by defendant, lack of actual deception of the public, and lack of secondary meaning in plaintiff's name.

Plaintiff first argues that the trial court erred in applying the "secondary meaning" doctrine to this case. This Court reviews equitable actions de novo and reviews the findings of fact supporting the decision for clear error. *Webb v Smith*, 224 Mich App 203, 210; 568 NW2d

378 (1997). We review questions of law de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

A "secondary meaning" arises if a word in a corporate name identifies a business or product regardless of the context in which the word is used. See *Educational Subscription Service, Inc v American Educational Services, Inc*, 115 Mich App 413, 423; 320 NW2d 684 (1982). A surname may, by appropriation and actual exclusive use, acquire a secondary meaning. *Buscemi's Inc v Anthony Buscemi Delicatessen and Party Store, Inc*, 96 Mich App 714, 717; 294 NW2d 218 (1980). The secondary meaning doctrine is an exception to the general rule that a person has the right to use his own name honestly in his own business even though he may thereby incidentally interfere with and injure the business of another having the same name. *Id*.

Contrary to plaintiff's assertion, the secondary meaning doctrine is used not only to establish technical trademarks but also to adjudicate unfair competition claims. See generally *Buscemi's Inc, supra,* and *Boron Oil Co v Callanan*, 50 Mich App 580; 213 NW2d 836 (1973). The test for whether a trade name has acquired a secondary meaning is "whether the business alleged to be infringing on the trade name is exploiting words or symbols which have become associated in the minds of potential customers with the other business" or whether use of the trade name by another would lead to confusion and deception. *Thrifty Acres, Inc, v Al-Naimi*, 119 Mich App 462, 466-467; 326 NW2d 400 (1982). Other factors to consider include the length of the name's use, the nature and extent of advertising and promotion of the name, and the efforts made to promote a conscious connection in the mind of the public between the name and the business. See generally *Boron Oil*, *supra* at 583-584.

Plaintiff has used the name "Fran Murdick's Fudge" for twenty years and offered evidence of some confusion in mail and supply delivery resulting from the proximity of defendant's business. He also presented testimony of two area business owners and friends that they think of his shop when they hear the name "Murdick." However, apart from a letter from a confused customer, who had actually mistaken plaintiff's store for defendant's, none of the testimony came from potential customers. Furthermore, plaintiff testified that he does not advertise apart from local bulletins and his labels, signs, and packaging. Moreover, it cannot be said that defendant was "exploiting" words associated with plaintiff's business when defendant himself had been operating fudge shops under the Murdick name in the Mackinac Straits area even before plaintiff opened his shop in Mackinaw City. Therefore, although some factors weigh in plaintiff's favor, the trial court's finding that plaintiff had not established a secondary meaning was not clearly erroneous, and we decline to reverse on this ground.

Next, plaintiff argues that the trial court erred in requiring plaintiff to show that defendant acted purposely to deceive the public. However, Michigan courts define unfair competition as the use by one person, *for the purpose of deceiving the public*, of a name used by a business rival, thereby obtaining benefits belonging to the rival. See *Schwannecke v Genesee Coal & Ice Co*, 262 Mich 624, 627; 247 NW 761 (1933). Moreover, even applying the case cited by plaintiff, *Weisman v Kuschewski*, 243 Mich 223; 219 NW 937 (1928), we find no error. Indeed, the court properly found, as a factual matter, that defendant's conduct did not constitute passing off his goods as plaintiff's goods or his business as plaintiff's business. See *id.* at 229.

Finally, plaintiff argues that the trial court erred by requiring him to show actual loss. Citing *220 Bagley Corp v Julius Freud Land Co*, 317 Mich 470, 477; 27 NW2d 59 (1947), plaintiff contends that to warrant an injunction, he need only have shown that injury to his business was threatened or imminent. Plaintiff claims that the inconveniences that will inevitably result from the confusion generated by defendant's proximity were sufficient to show threatened injury. However, even applying plaintiff's cited case (*Bagley*), we discern no error. Indeed, the potential confusion and injury apparent here from the existence of these two small fudge shops[1] simply did not rise to the level apparent in *Bagley*. See *Bagley, supra* at 475. As noted in *Good Housekeeping v Smitter,* 254 Mich 592, 596; 236 NW 872 (1931), each unfair competition case must be determined on its own individual facts. In light of the factual circumstances in the instant case, no error occurred with respect to the trial court's ruling.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter

[1] The court described the confusion in the instant case as "minimal."