DEVELOPMENTS— CONSTITUTIONAL LAW

ALMEIDA V. AMAZON.COM, INC.

456 F.3d 1316 (11th Cir. 2006)

The United States Court of Appeal for the Eleventh Circuit affirmed the district court's grant of summary judgment for defendant Amazon.com, holding that displaying a book's cover image in furtherance of the book's sale did not violate Florida's right of publicity statute because the display was incidental to, and customary for, the business of book sales and did not constitute an endorsement or promotion of a product or service pursuant to Fla. Stat. § 540.08

In 1991, Fabio Cabral, a fashion photographer, offered for sale a controversial book including photographs of girls between the ages of ten and seventeen, which included an image of Thais Cardosa Almeida when she was ten years old. Cabral had asked Almeida's mother's to authorize the use of the photograph, and two hundred copies of the book *Anjos Proibidos* ("Forbidden Angels") were sold before authorities stopped further sales of the book. In 2000, a second edition of the book was released with the plaintiff's picture on the book's cover. The book was offered for sale on Amazon.com, which provides for its customers an image of the book's cover.

Almeida sued Amazon.com for violating her right of publicity under Fla. Stat. § 540.08, civil theft under Fla. Stat. § 772.11, and for common law invasion of privacy. The United States District Court for Southern District of Florida granted Amazon's motion for summary judgment as to Almeida's right of publicity and privacy claims because their subject matter was preempted by the Communications Decency Act of 1996 ("CDA"). Further, the district court granted summary judgment against Almeida on her civil theft claim and awarded Amazon attorney's fees.

The Eleventh Circuit affirmed the district court's grant of summary judgment for Amazon, finding that Amazon.com did not use Almeida's image for the purpose of directly promoting a product or service as required by Fla. Stat. § 540.08. Instead, Amazon.com's use of the book cover image was incidental to, and customary for, the business of book sales. The court also found that Almeida also failed to present any evidence that Amazon.com misappropriated any of Almeida's property with felonious intent as required for Almeida's civil theft claim under Fla. Stat. § 772.11.

With respect to CDA immunity, the threshold issue was whether Almeida's complaint would withstand a motion to dismiss without regard to the CDA, specifically whether an internet retailer, such as Amazon, could be held liable under Florida's right of publicity statute for displaying a book's cover image in furtherance of the book's sale. Because it could not be held liable for displaying the book's cover image, the Eleventh Circuit found that it was unnecessary for the district court to determine whether the CDA preempted Almeida's state law right of publicity claim, and declined to rule on Almeida's challenges to the district court's ruling.

DOE V. MCFARLANE

207 S.W.3d 52 (Mo. Ct. App. 2006)

The Missouri Circuit Court, City of St. Louis, affirmed a jury verdict of $15 million against a comic book creator, holding that the use of the plaintiff's name for a character in a comic book series was not entitled to First Amendment protection because it was for the purpose of selling comic books and not an expressive comment about the plaintiff.

Defendant Todd McFarlane, acclaimed comic book writer and artist, creates a popular comic book called *Spawn* that features a villain named Tony Twist. McFarlane admitted he named his character after the plaintiff, Tony Twist, a former professional hockey player. After the first trial, a jury awarded $24.5 million to Twist. However, the trial court entered a judgment notwithstanding the verdict because Twist had not made a submissible case. On appeal, the Missouri Supreme Court ruled that Twist had made a valid right of publicity claim. The court clarified its preference for a "predominant use" test for determining First Amendment protection and determined that McFarlane's use, predominantly commercial rather than expressive, was not constitutionally protected and remanded the case for a second trial based on an instructional error. The jury awarded $15 million to Twist after a second trial.

McFarlane appealed the verdict of the second trial again to the Missouri Circuit Court, City of St. Louis. Bound by the Missouri Supreme Court's predominant-use analysis from the earlier proceedings, the court concluded that McFarlane's use merited no First Amendment protection because the use of Twist's name was predominantly commercial rather than expressive or literary. In particular, Twist presented evidence that McFarlane: (1) intended to create the impression that Twist was associated with McFarlane's comic book, (2) marketed comic books to hockey fans, and (3) McFarlane induced readers to purchase the comic book in order to see hockey players' names.

The court also found no abuse of discretion in admitting expert testimony regarding lost endorsement opportunities, separate expert testimony regarding the fair market value of *Spawn* royalties, and other relevant evidence.

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