Doe v. McFarlane

207 S.W.3d 52 (Mo.App. E.D. 2006)
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Appellants Todd McFarlane, creator of the Spawn comic book series, and Todd McFarlane Productions, Inc. ("McFarlane") appeal from a lower court decision entering judgment on a jury verdict against McFarlane awarding Tony Twist $15 million on a right of publicity claim. Respondent Tony Twist ("Twist") is a hockey player in the NHL. The Missouri Court of Appeals issued six holdings on June 20, 2006: (1) The use of the hockey player's name for a villainous comic book character was not protected speech; (2) expert opinions used at trial were based on facts and data of the type reasonably relied on by experts in the field; (3) a magazine article containing McFarlane's admission that he named the character after a hockey player was relevant to the right of publicity claim, and (4) was admissible under the 'admission of a party-opponent' hearsay exception; (5) a video tape of an animated cable television series was not inadmissible hearsay; and (6) it was appropriate for the court to use the modified versions of the Missouri Approved Instructions ("MAI") and non-approved language.

Appellants challenged the finding that the evidence demonstrated that the predominant purpose for using Twist's name was commercial and not artistic and, therefore, not protected speech. The predominant use test is used to distinguish between commercial exploitation and genuine expressive comment. The court, however, held that artistic value is not enough to invoke the first amendment under this test and the predominant use of the name "Tony Twist" was to sell comic books, not to make expressive comments. Appellants also challenged the admission of expert testimony regarding damages. In any civil action, if scientific knowledge will assist the trier of fact, a witness qualified as an expert may testify thereto, the testimony in the form of an opinion otherwise admissible is not objectionable because it embraces an issue decided, and the facts upon which an expert bases an opinion must be of the type reasonably relied on by experts in the field. Because the experts' opinion is entitled to deference, the only question in this case was whether the facts and data were otherwise admissible. The court overruled the appellants' challenges to the testimony because they all went to the weight of the testimony, not to its admissibility, and were properly addressed at trial.

Appellants also challenged the admittance of a magazine article and season one of the Spwan series on HBO as inadmissible hearsay. Statements of a party-opponent are admissions and may be admitted at trial as an exception to the hearsay rule if: the admission was conscious or voluntary, the matter acknowledged was relevant to the cause of the party offering the admission, and the matter acknowledged is inconsistent with the position taken at trial by the party-opponent. Evidence is hearsay only if its evidentiary value depends on drawing an inference from the truth of the statement. The court found that all of the evidence here was before the jury and there was nothing misleading or confusing about it.

Finally, the appellants challenged the use of a modified version of the MAI. Use of the MAI is mandatory in any case where the instructions are applicable. However, none of the MAI fit the particular circumstances of this case or the measure of the damages applicable; it was appropriate, therefore, to use modified versions of the approved instructions and non-approved language.

For the foregoing reasons, the judgment was affirmed.