



Arkansas Association of Defense Counsel

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Hot Dog Suit Doesn't Cut the Mustard

The U.S. District Court for the Eastern District of Pennsylvania recently found that there was no “immaculate deception” in a trademark and false advertising case brought by a company owned by former Pittsburgh Steeler Franco Harris against Tyson Foods, Inc. and its subsidiary Hillshire Brands Company. *Parks LLC v. Tyson Foods Inc., et al*, 2016 WL 2730688 (E.D. Pa. 2016).

The plaintiff, Parks, LLC, claims to be the owner of the trademark “Parks,” which it used in selling sausages and other processed meat products, primarily in markets along the east coast. The Parks Sausage Company was founded in Maryland in 1950 and went public in 1969, becoming the first African-American owned company to be listed on the New York Stock Exchange. The company became known regionally for its radio and television advertisements that contained a “distinctive plea in the voice of a child for ‘more Parks’ sausages Mom.” However, by 1996, the company had declared bankruptcy. Former NFL stars Franco Harris and Lydell Mitchell formed Parks, LLC, and in 1996 acquired the former company’s assets.

Tyson Foods, Inc. completed a merger with Hillshire Brands in August 2014, creating a product portfolio that includes brands such as Tyson, Wright Brand Bacon, Jimmy Dean, Sara Lee, State Fair, Hillshire Farm, and Ball Park. The Ball Park brand was launched in 1958 in response to a request from the owner of the Detroit Tigers baseball team. The Detroit Tigers worked with Hygrade Foods to develop a tastier stadium snack, and the new, plumper hot dog was a hit. Hygrade expanded the product beyond Tigers Stadium and into grocery and convenience stores under the

name Ball Park. Today, Ball Park is the number one hot dog brand in the United States. In February 2014, Ball Park announced publicly and began selling Ball Park Park’s Finest hot dogs. The Park’s Finest line is a “super-premium” line of hot dogs, and includes such flavors as Signature Seasoned Beef, Slow Smoked Hickory, Jalapeno Cheddar, and Smoky Cheddar.

In February 2015, Parks filed a complaint that charged Tyson and Hillshire with engaging in false advertising, trademark infringement, and trademark dilution in violation of the Lanham Act, 15 U.S.C. § 1125, as well as violating certain Pennsylvania competition and trade practices laws. Parks moved for a preliminary injunction on its false advertising claim, which the court denied because Parks could not demonstrate a likelihood of success on the merits. After the conclusion of discovery, Tyson and Hillshire moved for summary judgment on the then-remaining claims of false advertising and trademark infringement in violation of the Lanham Act and unfair competition under Pennsylvania law. The court determined that no reasonable factfinder could find in Parks’s favor and granted summary judgment.

The court first considered Parks’s claim of false advertising. The court found that the Lanham Act prohibits “two major and distinct types” of conduct - false association and false advertising - each with their own substantive rules and applicability. The false association prohibition relates to misrepresentations that are “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of [a] person with another person, or as to the origin, sponsorship or approval of his or her goods, services or commercial activities by another person.” 15

U.S.C. § 1125(a)(1)(A). The false advertising prohibition relates to claims that “misrepresent the nature, characteristics, qualities or geographic origin of goods, services or commercial activities.” *Id.* § 1125(a)(1)(B).

The false advertising claim was the basis for Parks’s request for a preliminary injunction. According to plaintiffs, Tyson’s use of “Park’s Finest” constituted false advertising because it misrepresented Tyson’s products as being products of Parks. The court found that claim to be one of false association, not false advertising. Absent a false statement about geographic origin, a statement is actionable as false advertising only if it misrepresents the characteristics of the good itself – such as its properties or capabilities. The court found that Tyson’s use of “Park’s Finest” could deceive consumers only if it led them to believe that the product was associated with Parks, which could only happen if Parks was a protectable trademark. Therefore, because Parks’s claim would succeed only to the extent it could establish that “Parks” “functions as a trademark in the minds of consumers,” the claim should be evaluated under the law of trademarks.

Moreover, the court found that even if the false advertising framework applied, a reasonable trier of fact could not find in Parks’s favor. To establish liability, the plaintiff was required to show:

- 1) that the defendant has made false or misleading statements as to his own product (or another’s); 2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; 3) that the deception is material in that it is likely to influence purchasing decisions; 4) that the advertised goods traveled in interstate commerce; and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.

A false statement can take one of two forms - either a literal falsehood or a literally true or ambiguous statement that has the tendency to deceive consumers.

The court found that Tyson had not made a literally false statement. The use of the name “Park’s Finest” did not unambiguously refer to Parks, and no reasonable factfinder could conclude otherwise. The court held that even a consumer who was familiar with the “Parks” brand would not necessarily come away with the conclusion that the use of “Park’s” on the hot dog packages was a reference to “Parks” rather than to Tyson’s “Ball Park” brand. A statement is literally false, the court held, “only if the statement, on its face, unambiguously conveys a false message.” The court examined the use of the term in the message it was presented, and concluded as a “matter of common sense and linguistics” that the use of “Park’s Finest” could “plausibly convey to consumers that the Park’s Finest frankfurters ‘are the highest-end product line under the Ball Park brand.’”).

In addition, the use of “Park’s Finest” is not likely to deceive a substantial portion of the intended audience. Whether a statement has the tendency to deceive depends on the message that is conveyed to consumers, which means that the success of these claims “usually turns on the persuasiveness of a consumer survey.” Tyson produced the only survey at the preliminary injunction phase, which found that only one person from a field of two hundred mistakenly believed that the Park’s Finest product originated from Parks – a confusion rate of less than one percent. Parks produced a survey in response to the motion for summary judgment, which it relied upon for both its false advertising and trademark infringement claims. The court found several faults with Parks’s survey, including the methodology of the survey and the fact that it was not directed at the proper universe of consumers. The court held that the survey was “unsuitable for supporting a claim of false advertising,” and that Parks had failed to produce sufficient evidence from which a reasonable trier of fact could find in its favor.

The court also found that Parks’s trademark claim was without merit. At one time, Parks had federal trademark registrations

for “Parks.” However, those registrations expired between 2003 and 2011. In order to maintain a claim for trademark infringement, a plaintiff must have a valid and legally protectable mark. If the mark is not federally registered, validity “depends upon proof of secondary meaning, unless the . . . unregistered mark is inherently distinctive.”

The name “Parks” originated with the founder of the company, Henry G. Parks. A mark that consists of a surname is generally not considered inherently distinctive, which means that a showing of secondary meaning is required. Parks did not contend that the “Parks” surname had acquired secondary meaning nationwide, but rather only in the “Eastern United States.”

The court found that a reasonable trier of fact could not conclude that the “Parks” name has secondary meaning in the Eastern United States. Secondary meaning exists when a mark is interpreted by the consuming public to be not only an identification of the product or services, but also a representation of the origin of those products or services. A number of factors can illustrate whether secondary meaning has been established:

- (1) the extent of sales and advertising leading to buyer association;
- (2) length of use;
- (3) exclusivity of use;
- (4) the fact of copying;
- (5) customer surveys;
- (6) customer testimony;
- (7) the use of the mark in trade journals;
- (8) the size of the company;
- (9) the number of sales;
- (10) the number of customers;
- and (11) actual confusion.

In this case, the court found that the “Parks” mark had been only minimally advertised. Advertising had been limited primarily to printed grocery store “circular ads,” in store demonstrations, and a limited number of trade shows. Due to the relatively small amount of sales, the court determined that a rational factfinder could not infer secondary meaning from sales or size of the company. The evidence did not permit a finding that Tyson “copied” the Parks name. The court

found that Parks’s survey did not establish evidence of secondary meaning. As to actual confusion, Parks could point to “only a handful of alleged instances of confusion, consisting of three unnamed consumers . . . and the testimony of one of Parks’s two co-owners that a few of his personal acquaintances mistakenly believed that the Park’s Finest product originated with Parks.” Finally, the court held that although the length and exclusivity of Parks’s use of the mark supported a finding of secondary meaning, Parks failed to quantify the nature and extent of the use.

Based on those findings, the court granted summary judgment in favor of Tyson. The case is currently on appeal to the U.S. Court of Appeals for the Third Circuit.

This edition of the newsletter was submitted by Bryan Burns of Tyson Foods, Inc., who is also Secretary of the AADC.

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