

**UNREPORTED**  
**IN THE COURT OF SPECIAL APPEALS**  
**OF MARYLAND**

No. 2202

September Term, 2006

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ASCENT FIRE PROTECTION  
SERVICES, LLC

v.

ADVANCED FIRE PROTECTION  
SYSTEMS, LLC

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Barbera,  
Moylan, Charles E., Jr.  
(retired, specially assigned)  
\*Murphy, Joseph F., Jr.  
(specially assigned),

JJ.

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Opinion by Moylan, J.

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Filed: January 23, 2008

\*Joseph F. Murphy, Jr., now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

In May of 2005, the appellee, Advanced Fire Protection Systems, LLC ("Advanced"), brought suit against the appellant, Ascent Fire Protection Services, LLC ("Ascent"), in the Circuit Court for Anne Arundel County. The suit, in three counts, alleged 1) the infringement of a common law trademark or service name, 2) the tortious interference with a contract, and 3) the tortious interference with a prospective advantage.

The case came on for a three-day bench trial before Judge Phillip Caroom beginning on October 31, 2006. Judge Caroom found in favor of Advanced on the first count and permanently enjoined Ascent from using the initials "AFPS." On the second count, Judge Caroom found that Ascent had technically interfered with one contract but had made no deliberate attempt to cause damage. He awarded nominal damages of \$1.00. On the third count, Judge Caroom found in favor of Ascent and that charge is no longer a factor in the case.

On this appeal, Ascent contends:

1. that Judge Caroom was clearly erroneous in finding that Advanced had established a common law trademark or service name;
2. that Judge Caroom was clearly erroneous in finding the intentional interference with a contract; and
3. that Judge Caroom erroneously refused to permit Ascent to introduce certain contracts into evidence.

Clearly, the first contention goes to the heart of the case and is the essential core of this appeal.

## Advanced's Common Law Service Mark

The thing over which Advanced and Ascent are fighting is the use of the initials "AFPS." Advanced claims that AFPS is now a recognized common law service mark used by it to denote, and recognized by the pertinent public as denoting, Advanced Fire Protection Services. Advanced alleges that when Ascent presumes to use those same initials, AFPS, to represent Ascent Fire Protection Services, it infringes upon Advanced's common law right to the service mark.

Advanced officially registered AFPS as its statutory trademark but only did so as of March 27, 2006. At the trial commencing on October 31, 2006, Judge Caroom declined to give that statutory trademark retroactive effect as he declared that he would "deny relief under the statute and just look back to the common law."

The definitive exposition of common law service marks and trade names is the opinion of Judge Cathell for this Court in Sea Watch Stores v. Unit Owners, 115 Md. App. 5, 691 A.2d 750 (1997). Judge Cathell quotes the Business Regulation Article for its definitions of both service mark and trade name.

Service mark is statutorily defined as a name "use[d] to advertise or sell services that the person performs to identify those services ... and to distinguish them from services that another person performs." Md. Code (1992), § 1-401(c)(2) of the Business Regulation Article (BR). Trade name is defined as "a name, symbol, word or combination of 2 or more of these that a person uses to identify the business or occupation of the person and to distinguish it from the business or occupation of another person." BR § 1-401(f).

115 Md. App. at 45 (emphasis supplied).

Our opinion also made it clear that common law service marks are protected even if not registered under the statute.

In the case sub judice, the service mark issue is not sought to be enforced under the statute. Appellee, in its complaint, correctly stated that common-law service marks are protected even if not registered under the statute. The statute itself preserves the enforceability of common-law trade or service marks.

Id. (emphasis supplied).

In further elaborating on the scope of the protected common law right, our opinion, id., quoted with approval from Prestwick, Inc. v. Don Kelly Bldg. Co., 302 F. Supp. 1121, 1124-25 (D. Md. 1969):

[W]here an entrepreneur has successfully marketed a product, services, or combination of both, other business enterprises should not be permitted to usurp his good name and reputation or to confuse the public into misassociating the two. ... It cannot be denied that the plaintiff has a legitimate right to the exclusive use of the name and that his services and the name by which he has chosen to connote them are entitled to be free from confusion with other products and services.

(Emphasis supplied).

Judge Caroom's opinion set out the first thing that must be established by a plaintiff seeking to show its entitlement to the exclusive use of a common law service mark or service name.

[U]nder the common law the first question is whether there is a trademark, service mark or service name, probably most appropriately it would be called a service name here, that has been established by the Plaintiff under common law.

Evidentiary support for Judge Caroom's ultimate finding and ruling was supplied by Michael Peters, who started Advanced as a sole proprietorship in 1999 and created a limited liability company of that name in 2001. He testified that Advanced used the initials AFPS in "advertising, vehicles, letterheads, building identification signs, all our tags." He produced photographs of Advanced's trucks prominently displaying AFPS. Peters testified that Advanced's clients refer to it as AFPS. He testified that Advanced used the initials AFPS on some of its contracts and in bidding for government jobs.

The critical factor in Judge Caroom's opinion was that he believed Mr. Peters and accepted his testimony as credible.

The testimony which I found credible by Mr. Peters was that he started using it individually as a sole proprietor in 1999 and then when he incorporated in 2001 or whatever we should call LLC formation. We don't call it a corporation I guess since it is not a traditional corporation.

When he registered his LLC he then treated that as an asset of the LLC and apparently has continued to treat it as an asset which he has brought to the LLC because of his ongoing use of it, notwithstanding the fact that he did an individual registration as well.

(Emphasis supplied).

Ascent protests that one cannot acquire a proprietary interest in a set of initials, claiming that something that common or in such common use could not be a service mark. That ignores, however, what has come to be known as "the secondary meaning theory," described by National Shoe Stores Co. v. National Shoes, Inc., 213 Md. 328, 336-38, 131 A.2d 909 (1957):

The third category consists of cases affording protection to a name which, although it consists of words in common use taken from the public domain, has acquired a secondary meaning through association with the seller's product or business in the minds of the general public ... "[H]ence came the 'secondary meaning' theory. There is nothing abstruse or complicated about this theory, however difficult its application may sometimes be. It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trademark."

(Emphasis supplied).

Judge Caroom found as a fact that Advanced's use of AFPS had acquired a secondary meaning and that the use of the initials by Ascent was causing confusion in the clientele that was detrimental to Advanced.

[T]he testimony of Mr. Peters is sufficient to confirm that reasonable consumers in the field of these services were in fact confused.

That he received a number of calls from people who had seen AFPS stickers and who were asking for Advanced Fire Protection Services to service their work that had been done ... [H]e went out, checked the jobs, and in fact discovered that it was Ascent using that service name rather than his own AFPS that Advanced had established.

So I do find considering all of the factors that the Plaintiff has established that a common law service name exists, that it exists having acquired a secondary meaning among that branch of the purchasing public, in this case the people who were local people using fire protection services, the people responsible for placing the calls for services needed.

They were in fact of the understanding that AFPS meant Advanced because they called Advanced when they needed service.

(Emphasis supplied).

Accordingly, Judge Caroom's Order provided:

ORDERED, that Plaintiff possesses a common law service mark of "AFPS" in the State of Maryland and that Ascent Fire Protection Services, LLC is, permanently enjoined from directly or indirectly using or displaying the name "AFPS," on its vehicles, equipment, marketing materials, advertising, bids and any items offered to the general public or placed in the stream of commerce in the State of Maryland, unless or until abandonment of its Mark by Advanced Fire Protection Systems, LLC.

(Emphasis supplied).

We see no error.

### **Tortious Interference With a Contract**

As we look at contentions two and three in combination, the appellant does seem to be expending an inordinate amount of time and effort on a peripheral matter that resulted in nominal damages of \$1.00. But, it's the appellant's appeal. With respect to the one instance of tortious interference that Judge Caroom did render a verdict against Ascent on, Judge Caroom's findings of fact were extensive.

The next count is tortious interference with contractual relations, and in that count it is required that there be an intent and purpose to interfere with a specific contract knowing that there was that contract between Plaintiff and a third person and basically disregarding that, with the intent to mislead or let the customer believe that they were dealing with the Plaintiff.

The only specific contract that was referred to on the Plaintiff's side was a contract with Knickerbocker 11 doing business as 9005, and in support of this Plaintiff offered these checks which were sent to it from Knickerbocker, and I think it is four checks. Let me go back and look at them.

These I think are Exhibit 9 or part of it. I take it back. Maybe three checks, all dated October 7 of 2004, but reportedly relating back to work that was done in September. And these checks are all made payable to Advanced Fire Protection Systems and were on the face of them however should have been payable to Advanced, the Plaintiff.

But as Mr. Peters testified, he went and looked for the invoices or job orders or something to indicate that he had actually done this work. Found he had not done the work, and contacted the Knickerbocker people who issued the check and said, "I don't think I did this work. Would you please send me the invoices," et cetera.

He testified that he got back the invoices which are another part of Exhibit 9, and discovered that it, in fact, it was the wrong address, that it was the address of the Defendant, Ascent, although the invoice on the face of it says AFPS. Again, the service name of Advanced.

He also testified that Knickerbocker had been the client and Knickerbocker still was the client of Advanced today. The testimony on the other side was that Knickerbocker is one of many properties managed by Lincoln Properties.

....

Mark Conner testified that he had previously worked for I think Eastern Fire Protection Services or some business to that effect and that he left them and he had a good friend at Lincoln Properties whose name is Don Howard.

And that he, upon leaving, contacted Don Howard and said, "I'm with this new company, Ascent," didn't make reference to AFPS, "And therefore I'll underbid whoever your existing service providers are. Let me send you some contracts." Faxed them some contracts, and eventually got the business. Got a smaller number of contracts initially in 2004 and then got a larger number later.

The problem I have with that testimony in terms of its sufficiency is that I heard specific designations of Portals of Alexandria, which is one of the contracts in dispute, Lions Gate, of various other ones. But I never, I don't

believe, heard any testimony from Mr. Carney or anyone else to say that one of those contracts was Knickerbocker 11 doing business as 9005.

So it is not clear to me that it was rebutted. Mr. Peters and Advanced have acquired as a client Knickerbocker 11 doing business as 9005. Apparently they did have that one of Lincoln Properties even if there are other Lincoln Properties that Ascent had.

And it was the testimony of Mr. Titow that it was his policy and practice that he would not go out on a job unless he had checked to see that there was a service contract and that it was his job. And in this case he didn't testify, no one testified, that that had happened.

But there was testimony, there was evidence from the Plaintiff's side of the case that in fact Ascent had gone and serviced the job which was truly a contract belonging to Advanced. So I do find that it was an instance where in violation of the policy of Ascent.

Ascent apparently sent someone out to do this work when it was not their client, not their contract, and they got paid for it because Mr. Peters said that he sent the checks back. He didn't do the work so he wasn't going to take the pay, and as a result there was a loss by Advanced from Ascent in effect jumping in and taking its contract where it didn't have that contract legitimately on its own.

(Emphasis supplied). See Orfanos v. Athenian, Inc. 66 Md. App. 507, 519-24, 505 A.2d 131 (1986). We hold that those findings were supported by competent evidence and were, therefore, not clearly erroneous.

### **Rejection of Unauthenticated Contracts**

Ascent contends that Judge Caroom erroneously refused to receive in evidence four ostensible contracts between Ascent and Lincoln Properties. The documents were of questionable authenticity. Judge Caroom applied Maryland Rule 5-901, which provides, in pertinent part:

(a) **General provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

....

(3) Comparison with authenticated specimens. Comparison by the court or an expert witness with specimens that have been authenticated.

(4) Circumstantial evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

(Emphasis supplied).

Judge Caroom examined the documents and was not satisfied that they were genuine or authentic. After looking at the contracts, Judge Caroom ruled:

THE COURT: I am going to sustain the objection on the grounds that on the face of contract there appears to be irregularity which is unexplained to me in the signature. There are actually four contracts that have been submitted, all purporting to be signed by Don Howard as an engineer for Lincoln Property Company is what the stationery and faxes say, and just comparing the signatures on the four different contracts they are grossly different.

They all purport to be signed on June the 3rd, 2004, but the signature from one contract to the next and the way that the name is printed from one contract to the next are so different that it is basically not credible to me that the same person signed all four contracts on the same occasion as is purported.

And if more than one person is signing the contracts, then one of them at least has got to be not Don Howard. So since there is this irregularity on the face of it the Court will sustain the objection finding that they may not be

admitted since the--because of that apparent irregularity that there would seem to be an issue of authenticity.

Don Howard is someone who by testimony we have heard would be an important witness, and since he has not been produced the Court would have concerns. So I will sustain the objection to Exhibit L at this time.

(Emphasis supplied). We cannot say that he abused his discretion in making such a quintessential evidentiary judgment call. If the appellant fails to introduce the necessary authenticating evidence at the trial proper, moreover, he does not become entitled to a grant of his post-trial motion to reconsider so that he can then offer the ostensibly authenticating evidence belatedly.

**JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.**