

## **Newcombe v. Adolf Coors Co., et al**

157 F.3d 686 (9th Cir. 1998)

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Donald Newcombe, a former Major League Baseball all-star, filed suit in California state court against Adolf Coors Company ("Coors"), Cone and Belding Advertising ("Belding"), and Time Inc. for using his likeness and identity without his permission in an advertisement for Killian's Irish Red Beer. Newcombe alleged that this identity had been misappropriated in violation of California law, that the advertisement was defamatory because it portrayed him as endorsing beer (Newcombe is a recovering alcoholic), that the advertisement was negligently created, and that the defendants intentionally inflicted emotional distress upon Newcombe with the advertisement. The District Court for the Central District of California granted summary judgment in favor of the defendants on all tort claims and Newcombe appealed.

Newcombe claimed the defendants violated his right of privacy and used his likeness and identity to their commercial advantage in violation of Cal. Civ. Code § 3344 and the state's common law right of privacy. The court held that in order to sustain a common law cause of action for commercial misappropriation, a plaintiff must prove: (1) defendants' use of plaintiff's identity; (2) appropriation of plaintiff's name or likeness to defendants' advantage; (3) lack of consent; and (4) resulting injury. Under California law, only uses of a likeness that are directly connected with commercial sponsorship constitute use of that likeness.

The district court found there was a genuine issue of material fact with regard to defendants' use of Newcombe's likeness, that defendants did use Newcombe's likeness to their commercial advantage, that Newcombe did not consent to the use of his likeness, and that Newcombe was not compensated for use of his likeness. As for Newcombe's statutory claim, the court held it would "not be unreasonable for a jury to conclude that there was a direct connection between Newcombe...and the commercial sponsorship" of the beer.

Newcombe also alleged he was defamed by the advertisement because it hinted that he endorsed alcohol and its use. Newcombe testified he was a recovering alcoholic and the advertisement gave rise to a false light tort. Under California law, a plaintiff may only prevail on a libel claim if the publication is libelous on its face or if special damages have been proven. In determining whether a publication is libelous on its face, the court measures the effect the publication has on the mind of the average reader. The court held that Newcombe failed to show the advertisement's meaning was defamatory on its face, and thus failed to prove special damages.

Newcombe also claimed the defendants were negligent in creating the advertisement because they did not ensure the artist's rendition of the baseball player did not resemble a real person. The court found this claim invalid because it did not include a claim for damages resulting from the negligence and, specifically, there was no damage to Newcombe from the mere creation of the advertisement.

Newcombe's final claim was that defendants were liable for intentional infliction of emotional distress ("IIED"). In order to prevail on an IIED claim, a plaintiff must show: (1) defendants' conduct was outrageous; (2) defendants intended to cause, or recklessly disregarded the likelihood of causing, emotional distress; (3) plaintiff experienced severe emotional suffering; and (4) actual and proximate cause of

emotional distress.

The court here found no evidence that defendants engaged in intentionally outrageous conduct, that the artist who drew the picture for the advertisement did so with the intent to harm Newcombe since the artist did not know who Newcombe was or that he was a recovering alcoholic, nor that anyone associated with the advertisement intended it to represent Newcombe or cause anyone to believe it resembled Newcombe.

The Court of Appeals reversed the district court's grant of summary judgment in favor of defendants on Newcombe's claim of commercial appropriation, his statutory claim of a direct connection between use and commercial purpose, and his claim for equitable relief. On all other claims, the court affirmed the district court's holding.