

No. 17- 8352

IN THE
Supreme Court of the United States

JOHANNES T. MARTIN,
Petitioner,

v.

LIVING ESSENTIALS, LLC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**BRIEF OF *AMICUS CURIAE* THE
POSNER CENTER OF JUSTICE FOR PRO SE'S
IN SUPPORT OF PETITIONER**

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**AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

INTEREST OF *AMICUS CURIAE*¹

I am submitting my *amicus curiae* brief because I think Ted Martin has a compelling case for reversal of the Seventh Circuit's rejection of his suit.

My name is Richard A. Posner. I am a former judge of the U.S. Court of Appeals for the Seventh Circuit.

I retired on September 2, 2017 from the bench because I could no longer accept the Seventh Circuit's exceedingly poor treatment of *pro se* litigants. The court's discriminatory practices against *pro se* litigants plain for all to see in the case of *Martin v. Living Essentials, LLC*.

My legal career began when I graduated first in my class from Harvard Law School in 1962. From 1962 to 1963 I clerked for U.S. Supreme Court Justice William Brennan and from 1965 through 1967 I was an assistant to the Solicitor General of the United States, Thurgood Marshall, and briefed and argued cases in the Supreme Court. Following these government jobs I spent 11 years as a full professor of law at the University of Chicago Law School before I was appointed to the United States Court of Appeals for the Seventh Circuit in 1981.

¹ In accordance with Rule 37.6, *Amicus* certifies that no counsel for any party authored this brief in whole or in part, and no person or entity other than named *Amicus* made a monetary contribution for the preparation and submission of this brief. The parties consented to the filing of this brief.

I was a member of the Court of Appeals for over 35 years (and chief judge from 1993 to 2000) before retiring on September 2, 2017, and during this period was the most frequently cited legal scholar in the United States.

I had noticed, however, as a judge that the vast majority of the complaints submitted by *pro se* litigants were being dismissed outright over technical matters in the Seventh Circuit. I asked the staff attorneys, to whom the appeals of *pro se*'s are submitted in the first instance for review and recommendation, why so many *pro se* complaints were being dismissed so early in the process, and they replied that they take their cues from the judges and believe that the judges are hostile to *pro se* litigants. I was tired of being part of a system comfortable with zero accountability. I therefore decided to retire from the Seventh Circuit and form a new firm (now seven months old, and named The Posner Center of Justice for Pro Se's) to help *pro se* plaintiffs and defendants.

Mr. Martin saw an article in the *Chicago Tribune* about my new company and asked if I would review his case. I agreed (on March 21, 1966, the Clerk of Supreme Court of the United States had issued a formal certificate that certifies that I am "an Attorney and Counselor of the Supreme Court of the United States," and that designation has to my knowledge never been revoked), and I have concluded that the Seventh Circuit is indeed deficient in its treatment of *pro se* litigants.

SUMMARY OF ARGUMENT

Mr. Martin had a right of protection from the unauthorized use of his name and world record of which rights were violated under the Illinois Right of Publicity Act (765 ILCS 1075) and the false endorsement act of the Lanham Act (15 U.S. Code Sec. 1125). A person whose rights have been violated under the Lanham Act and Illinois Right of Publicity Act has a cognizable claim to pursue damages. The actions of the Seventh Circuit are in complete disregard of the Supreme Court's unanimous decision in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

Mr. Martin, who throughout this litigation has been *pro se*, was a victim of mistreatment by my former court, which did not even exercise enough diligence to establish that "the record for Hacky Sack" is a specific reference to his record. Yet that he is widely recognized as holding "the record for Hacky Sack" can easily be confirmed by googling "the record for Hacky Sack. Nevertheless, in a nationally televised commercial, the Defendant's (Living Essentials} spokesman stated: "I mastered origami, while beating the record for Hacky Sack" and "How do I do all of this? 5-hour ENERGY."

ARGUMENT

Mr. Martin sued Living Essentials, LLC under the Illinois Right of Publicity Act (765 ILCS 1075/) and both the false endorsement and false advertising elements of the Lanham Act. (15 U.S. Code § 1125). All of Mr. Martin's claims are based on the fact that "the record for Hacky Sack" is a specific reference to

his record, making defining “the record for Hacky Sack” of the utmost importance.

In an effort to avoid accountability, the Defendant asserted that “the record for Hacky Sack” was a vague and ambiguous term that could be referring to any Hacky Sack record. Wrong; as noted in Mr. Martin’s cert. petition, the sports-loving public has referred to the consecutive kicks record as the record for Hacky Sack ever since John Stalberger and Mike Marshall invented the game in 1972.

In his original case in the Seventh Circuit Mr. Martin had produced a copy of his Upper Deck trading card that clearly identified him as holding the world record for most consecutive Hacky Sack kicks. In addition he produced a *Chicago Tribune* article about his previous world record that states: “Now imagine kicking it 51,155 consecutive times. That’s the world record for Hacky Sack, or footbag, kicks, set by Ted Martin, 37, of Des Plaines. He did it in 7 hours, 1 minute and 37 seconds in ’93 and made the Guinness Book of World Records.”

In disregard of federal-notice pleading standards, the District Court accepted the Defendant’s unsupported assertions about the meaning of “the record for Hacky Sack” over the supported assertions of a documented world record holder. The was compounded in Martin’s appeal when the Seventh Circuit Court of Appeals, in a perfunctory opinion, accepted the district judge’s ruling without analysis.

Mr. Martin filed a petition for rehearing stating that the District Court had erred in its determination that “the record for Hacky Sack” was an ambiguous term. The Seventh Circuit denied the petition and affirmed the District Court’s dismissal without comment. Mr. Martin then consulted with three senior people in the Clerk’s Office who assured him that he could file a new complaint that would be randomly assigned to a different judge. This is proper procedure under FRCP Rule 60.

Mr. Martin secured letters from seven Hacky Sack experts and filed a new complaint on March 15, 2017, which the Clerk’s Office sent back to the same district court judge who had heard the original case. Mr. Martin objected that three senior people in the office had assured him that the new complaint would be randomly assigned to a different judge. The clerks refused, and also denied Mr. Martin’s request to withdraw his complaint in order to be able to research the matter further.

The district court record of Martin’s case includes letters from seven Hacky Sack experts, including letters from John Stalberger, the co-inventor of Hacky Sack, and Bruce Guettich, the president of the World Footbag Association—the governing and sanctioning body of the sport. All of these experts confirmed that “the record for Hacky Sack” is a specific reference to Martin’s record. John Stalberger, the co-inventor of Hacky Sack, concluded his supporting letter with the following statement: “Ted Martin’s record of 63,326 kicks is recognized the world over as ‘the record for Hacky Sack’” I agree with Mr. Martin that no

reasonable person can argue with John Stalberger about the meaning of “the record for Hacky Sack”.

At this point in the case Mr. Martin had assumed that the District Court had simply made a mistake and would acknowledge error in light of the overwhelming evidence that he had presented. In the original case the district court had said: “Martin contends that ‘the record for Hacky Sack’ is a phrase that identifies him particularly, but the phrase is far too ambiguous to do so. The language and graphic of the Commercial depict vague generalities regarding ‘the record for Hacky Sack’ and do not clearly indicate that someone has broken the specific record that Martin set (or any other particular hacky sack record). Living Essentials points to the diverse array of hacky sack records (at least 14 different records, Mem. in Supp. 8 n. 7), arguing that Martin’s assertion that he holds *the* record is a mischaracterization. *Id.* 7-8. The Commercial, moreover, depicts a man kicking two footbags, not one. *Id.* Ex. A.”

After reading the 2017 Complaint, the Defendant filed a motion to dismiss based on the doctrines of res judicata and collateral estoppel. At the initial status hearing on May 3, 2017, Mr. Martin informed the district court judge that “the record for Hacky Sack” was a specific reference to his record, that the Defendant had made false representations to the court, and that the new complaint contained letters from the co-inventor of Hacky Sack and the president of the World Footbag Association. (Exhibit D) and from seven Hacky Sack experts including John Stalberger; the co-inventor of Hacky Sack, and Bruce Guettich; the founder and president of the World

Footbag Association. All these experts state that “the record for Hacky Sack” is a reference to Martin’s particular record and that he is the record holder.

(Exhibit D) of the 2017 complaint includes a letter from the co-inventor of Hacky Sack. John Stalberger, also known as Mr. Hacky Sack, who defines “the record for Hacky Sack” in his letter and ends by saying that “Ted Martin’s record of 63,326 kicks is recognized the world over as ‘the record for Hacky Sack.’”

As in the original case, the District Court ignored all evidence presented by Mr. Martin and granted the Defendant’s motion to dismiss based solely on the Defendant’s assertion that these doctrines applied. The judge went so far as to threaten Mr. Martin with sanctions for pointing out that the Defendant’s actions violated the signing requirements under FRCP Rule 11.

Mr. Martin filed a timely Notice of Appeal. On page #2 of its order, resolving the appeal against him, the same panel of Seventh Circuit judges who had heard the original case stated:

The district court painstakingly examined Martin’s new, 31-page complaint and explained why the doctrine of res judicata prevents Martin going forward with the case. We agree that the district court got it right and have nothing to add to its thorough and well-reasoned opinion. We therefore adopt the district court’s opinion as our own in this appeal.

Mr. Martin filed a petition for rehearing, which however all of the judges on the original panel voted to deny. By doing so the court may have violated Mr. Martin's constitutional right to due process by not exercising the due diligence necessary to analyze the evidence that Mr. Martin had presented, let alone to consider whether the District Court had resolved the questions of law correctly.

The Seventh Circuit Court of Appeals dismissed yet another one of Mr. Martin's cases without legal justification on April 9, 2018, in *Martin v. Wendy's International, Inc.* Case No. 17-2043. The Defendants, Wendy's International, Inc. and Guinness World Records Limited, held a promotion in the U.S. and Canada from August 12th to September 22nd 2013 in which they connected Mr. Martin and his world record of 63,326 kicks to *their* promotional footbag. They printed GUINNESS WORLD RECORDS directly on their promotional footbag, mounted the footbag on an in-store display, and pictured the footbag on the Wendy's Kid's Meal bag.

The consumer was given the choice of one of six toys with every Wendy's Kid's Meal purchase. Each toy, including the footbag, was described as "record-breaking" on both sides of the Kid's Meal Bag. When chosen, the GUINNESS WORLD RECORDS record-breaking footbag would be included in the Wendy's Kid's Meal bag. The Defendants' footbag would come sealed in a separate plastic bag with a card. The Defendants' logos were prominently displayed on the in-store display, the Kids' Meal bag, the plastic bag, and the card. The card states,

How many times in a row can you kick this footbag without hitting the ground? Back in 1997, Ted Martin made his world record of 63,326 kicks in a little less than nine hours! Practice makes perfect, so first try flicking the footbag from one foot to the other or to your knee.

Mr. Martin brings suit against the Defendants for the unauthorized use of his name and world record in violation of his rights under the Illinois Right of Publicity Act (765 ILCS 1075) and the false endorsement arm of the Lanham Act. (15 U.S.Code § 1125). As the manufacturer of the actual record-breaking footbag he used to break the 63,326 kick record, Mr. Martin also brings suit under the false advertising arm of the Lanham Act (15 U.S. Code § 1125) for equating his actual record-breaking footbag to the Defendant's inferior promotional footbag.

All of Mr. Martin's claims are clear cut and straightforward, but I will focus on Mr. Martin's right of publicity claim. The Illinois Right of Publicity Act recognizes and protects the right of every individual to control the commercial use of his "identity." 765 ILCS 1075/10. The Act defines its key terms to eliminate any possible confusion regarding the intent of the lawmakers. So we read in section 5 that "Commercial purpose" means the public use or holding out of an individual's identity (i) on or in connection with the offering for sale or sale of a product, merchandise, goods, or services; (ii) for purposes of advertising or promoting products, merchandise, goods, or services; or (iii) for the purpose of fundraising. "Identity" means any attribute of an

individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice. “Individual” means a living or deceased natural person, regardless of whether the identity of that individual has been used for a commercial purpose during the individual’s lifetime.

The Illinois Right of Publicity Act prohibits any unauthorized commercial use of an individual’s “identity”: Sec. 30. Limitations regarding use of an individual’s identity. (a) A person may not use an individual’s identity for commercial purposes during the individual’s lifetime without having obtained previous written consent from the appropriate person or person’s specified in Section 20 of this Act or their authorized representative.

There are only three elements that need to be established for a defendant to be found liable under the Right of Publicity Act. These elements are (1) identity, (2) commercial purpose, and (3) lack of consent. The card which came sealed in the same plastic bag with the Defendants’ footbag prominently features the Defendants’ logos on the card as well as the plastic bag. The card states,

How many times in a row can you kick this footbag without hitting the ground? Back in 1997, Ted Martin made his world record of 63,326 kicks in a little less than nine hours! Practice makes perfect, so first try flicking the footbag from one foot to the other or to your knee.

The Defendants did not claim to have obtained Mr. Martin's written consent to use his name and world record in their promotion. Clearly they used his identity for commercial purposes without having obtained previous written consent in violation of Sec. 30 of the Right of Publicity Act.

The District Court should have recognized that the Defendants had violated Mr. Martin's right of publicity and should have gone on to address his other claims. But the Defendants made numerous false and misleading representations to justify their unauthorized use of his name and world record in their promotion. They went so far as to misrepresent the Supreme Court's unanimous decision in *Lexmark v. Static Control Components, Inc.* 134 S. Ct. 1377, 1380 (2014) by changing the prefix of a quotation on page 5 of the Defendants' joint motions to dismiss.

The District Court appears not to have understood the applicable laws governing the case. The Court's confusion is demonstrated in the following statement on page 9 of its opinion: the

plaintiff does not challenge Guinness's right to list his record in its book, and it would be nonsensical to hold that [the] Lanham law prohibits Guinness from reciting that bare fact in a promotional item but permits it to include the fact in the book it sells. Plaintiff fails to state a claim for violation of his right of publicity under the IRPA.

The right of publicity is often described as the "inherent right of every human being to control the commercial use of his or her identity." *J. Thomas*

McCarthy, Melville B. Nimmer and the Right of Publicity: A Tribute, 34 U.C.L.A.L. Rev. 1703, 1704 (1987). It is the “commercial use” of the person’s “identity” that the law protects. Guinness is permitted to list Mr. Martin’s name and record in its book under Sec. 35(a)(b)(1) provided that it “does not constitute in and of itself a commercial advertisement for a product, merchandise, or goods”:

On March 7, 2018, Mr. Martin called the Seventh Circuit Court of Appeals to inform it that he would be out of town from March 10, 2018 to March 17, 2018, and respectfully asked the court to take no action that would require a response from him at this time. The clerk told him there was nothing on the docket and assured him that no action would be taken while he was away. Contrary to the clerk’s assurances, the Court of Appeals affirmed the District Court’s dismissal in his absence, stating tersely: “Submitted March 8, 2018* Decided March 9, 2018,” and adding: “*We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. Fed. R. App. P. 34(a)(2)(C).”

Not only was Mr. Martin not afforded a common courtesy routinely granted lawyers, but it appears that the Seventh Circuit deliberately rushed to dismiss his case in order to give him the least amount of time in which to respond. The court is unlikely to have been able adequately to review his case in a single day.

On March 23, 2018, Mr. Martin filed a petition for rehearing en banc with the following required statements:

It is a matter of significant national importance that the laws that govern commerce are enforced in a uniform and consistent manner to insure that each and every individual has the right to control the commercial use of their identity and that the consumer is not subjected to false and misleading advertising.

The Seventh Circuit's dismissal of Ted Martin's right of publicity claim is in conflict with *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014). And its dismissal of [Martin's] Lanham Act false endorsement claim is in conflict with *Abdul-Jabbar v. General Motors*, 75 F.3d 1391 (9th Cir. 1996), and its dismissal of [Martin's] Lanham Act false advertising claim is in conflict with the Supreme Court's unanimous decision in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct. 1337 (2014).

In his petition for rehearing en banc, Mr. Martin pointed out that the Seventh Circuit's dismissal of his right of publicity claim was in conflict with the Seventh Circuit's own decision in *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014), a case similar to Mr. Martin's in that the defendant used the plaintiff's name and achievement for commercial purposes without having obtained previous written consent. Jewel was offered free advertising space in

Sports Illustrated in exchange for agreeing to stock the magazine in its stores. Jewel accepted the offer and ran an ad congratulating Jordan on having been inducted into the Basketball Hall of fame. The ad featured the “Jewel-Osco” logo, and the defendant’s marketing slogan was linked to Jordan in the text of the congratulatory message that said: “we honor a fellow Chicagoan who was ‘just around the corner’ for so many years.”

Jordan sued under the Illinois Right of Publicity Act and the Lanham Act. Jewel maintained that the ad was “noncommercial speech” and thus entitled to full First Amendment protection. The district court held that the ad was fully protected noncommercial speech and entered judgment for Jewel. The Seventh Circuit reversed, stating “The ad is commercial speech and thus is subject to the laws Jordan invokes here.”

The court of appeals’s entire response to Mr. Martin’s petition for rehearing en banc was as follows:

On consideration of plaintiff Johannes T. Martin’s petition for rehearing en banc, filed on March 23, 2018, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition. Accordingly, the petition for rehearing en banc filed by plaintiff Johannes T. Martin is **DENIED.**

In *Martin v. Wendy’s International Inc.*, the Seventh Circuit Court of Appeals failed to acknowledge evidence that showed that the District Court’s determinations were erroneous, and in *Martin v.*

Living Essentials, LLC, the Court failed to acknowledge evidence that clearly indicated that the “record for Hacky Sack” was a reference to Mr. Martin’s record.

In spite of this Supreme Court’s instruction to construe *pro se* complaints liberally and hold them to a less stringent standard than formal pleadings drafted by lawyers, the Seventh Circuit in regard to *pro se* complaints fails to exercise the due diligence necessary to ascertain the facts in the case and resolve the applicable questions of law fairly and accurately.

CONCLUSION

The Seventh Circuit’s decision has prompted Mr. Martin to seek review by this Court—the Supreme Court of the United States, his only path to justice in a case that should not have been dismissed by the lower courts.

Respectfully Submitted,

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