

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

RENEE LEE, Parent and Guardian :
Ad Litem for B.L., RENEE LEE and :
LEWIS J. LEE, III, :
 : C.A. No: K10C-07-002 (RBY)
Plaintiffs, :
 :
v. :
 :
THE PICTURE PEOPLE, INC., :
a corporation of the State of :
Delaware, :
 :
Defendant. :

Submitted: December 9, 2011

Decided: March 19, 2012

*Upon Consideration of Defendant's
Motion for Summary Judgment
Counts I - IX*

DENIED IN PART, GRANTED IN PART

OPINION AND ORDER

Christopher J. Curtin, Esq., MacElree Harvey, Ltd., Centreville, Delaware for
Plaintiffs.

William J. Cattie, III, Esq., Rawle & Henderson, LLP, Wilmington, Delaware for
Defendant.

Young, J.

SUMMARY

_____ Lewis Lee and Renee Lee (Plaintiffs) and their minor child, B.L., initiated this suit asserting ten causes of action. The Picture People, Inc. (Defendant) filed the instant motion for summary judgment of Counts I-IX. Defendant's motion is **DENIED** in part and **GRANTED** in part.

FACTS

_____ Plaintiffs are the parents of B.L., their minor child.¹ The Picture People, Inc. (Defendant), located in the Dover Mall, engages in the business of family photography.

Defendant's website includes a privacy policy. The policy is provided in conjunction with online services through which customers may interact with Defendant. Customers use the online services to register for accounts, order products, request customer support, sign up for news alerts, enter sweepstakes, redeem special offers, respond to surveys and the like. The policy informs customers that, when they take advantage of those services, the information they provide will be kept secure. That information includes customer names, addresses and credit card numbers.

On October 10, 2008, when B.L. was two years old, Mrs. Lee took him to Defendant's place of business to be photographed. The photographs were intended for personal, family or household use. In total, Mrs. Lee purchased \$333.95 worth of photographs of B.L. with frames.

¹ All three parties are named as plaintiffs. Because Plaintiffs' claims are not identical to those asserted by B.L., this opinion identifies them separately.

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

Upon checkout, the photographer requested that Mrs. Lee allow her to use a picture of B.L. holding a pumpkin in a contest that would benefit the photographer, but not benefit Plaintiffs or B.L. She presented Mrs. Lee with a consent form. Mrs. Lee refused to execute it.

On September 15, 2009, Mrs. Lee discovered that Defendant had provided B.L.'s daycare center with four large photographs of B.L. wearing a giraffe costume. The photographs were intended for advertising purposes. The complaint does not allege that they were ever hung. In any event, they were not on display after Mrs. Lee discovered their existence.

On September 16, 2009, Mrs. Lee spoke with Defendant's store manager, Matt Scott. Scott confirmed that Defendant did not obtain consent to use the photographs. On September 17, 2009, Mrs. Lee spoke with Defendant's regional manager, Kim Scholl, by email. Scholl stated that she would provide Mrs. Lee with a disc containing all photographs of B.L., and that she would erase the images from Defendant's system.

_____ On July 1, 2010, Plaintiffs and B.L. filed a complaint asserting ten causes of action against Defendant: Appropriation (Count I); Intrusion Upon Seclusion (Count II); False Light (Count III); Intentional Infliction of Emotional Distress (Count IV); Breach of Warranty (Count V); Magnuson Moss Act Violation (Count VI); Consumer Contracts Act Violation (Count VII); Consumer Fraud Act Violation (Count VIII); Elder/Disabled Victim Enhanced Penalties Act Violation (Count IX); and Negligence/Recklessness (Count X). Plaintiffs seek damages under each Count. By stipulation of the parties, B.L. seeks damages under Counts I-III only.

STANDARD OF REVIEW

_____ Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.² The movant bears the initial burden of establishing that no genuine issue of material fact exists.³ Upon making that showing, the burden shifts to the non-movant to show evidence to the contrary.⁴ When considering a motion for summary judgment, the Court considers the facts in the light most favorable to the non-movant.⁵

DISCUSSION

_____ Defendant's motion for summary judgment is actually divided into six separate filings. The first filing addresses Counts I-IV together. The five subsequent filings address Counts V-IX individually. This opinion resolves each matter in the order in which each is presented to the Court.

Defendant's Motion For Summary Judgment of Counts I-IV

Defendant's motion for summary judgment addresses Plaintiffs' and B.L.'s tort claims together. Defendant argues that, because Plaintiffs' tort claims are derivative upon B.L.'s tort claims, it is entitled to summary judgment thereof, because Plaintiffs have failed to plead physical manifestation of emotional distress. In response, Plaintiffs contend that their claims are not derivative of B.L.'s claims because their

² *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

³ *Ebersole v. Lowengrub*, 54 Del. 463 (Del. 1962).

⁴ *Id.*

⁵ *Tedesco*, 2006 WL 1817086 at *1.

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

individual rights to privacy were invaded.

In support of its argument, Defendant cites *Waterhouse v. Hollingsworth*.⁶ In *Waterhouse*, the Superior Court held that claims for intentional infliction of emotional distress and negligent infliction of emotional distress require a “zone of danger” and “manifestation of physical symptoms” analysis when the claims are derivative.⁷ A claim is derivative when it seeks relief for conduct done unto another person.⁸

Defendant’s argument is applicable to Plaintiffs’ claims for intentional infliction of emotional distress. In regard to Plaintiffs’ claims for appropriation, intrusion upon seclusion and false light claims, however, Defendant’s argument is misplaced. The *Waterhouse* analysis is unique to emotional distress claims. Accordingly, it does not advance Defendant’s cause. In any event, with the exception of B.L.’s appropriation claim, each of Plaintiffs’ and B.L.’s claims fail as a matter of law. The Court will address each claim in turn.

Appropriation (Count I)

In Count I of the complaint, Plaintiffs and B.L. allege appropriation. Tort claims seeking relief for invasion of privacy are grouped into four, distinct types of wrongs: appropriation, intrusion upon seclusion, false light and public disclosure of

⁶ 2010 WL 8250801 (Del. Super. May 3, 2010).

⁷ *Id.*

⁸ *Id.*

private facts.⁹ Appropriation claims seek redress for the “appropriation of some element of a person’s personality for commercial use, such as commercial use of a photograph without permission of the person photographed.”¹⁰

Although Defendant’s derivation argument, discussed above, does not necessitate pleading zone of danger or physical manifestation of symptoms, Defendant is correct that Plaintiffs’ appropriation claims are derivative of B.L.’s claim. In other words, Plaintiffs’ images were not, themselves, appropriated. The only image in question is that of B.L. Accordingly, Plaintiffs fail to plead each element necessary to their appropriation claims. Defendant’s motion for summary judgment of Plaintiffs’ appropriation claims is **GRANTED**.

On the other hand, B.L. has pled facts sufficient to sustain Defendant’s motion for summary judgment in regard to his appropriation claim. The complaint alleges that Defendant distributed his image, without consent, for advertising purposes. The record contains evidence sufficient to sustain a motion for summary judgment. Defendant’s motion for summary judgment of B.L.’s appropriation claim is **DENIED**.

Intrusion Upon Seclusion (Count II)¹¹

In Count II of the complaint, Plaintiffs and B.L. allege that Defendant intruded upon their seclusion. A claim for intrusion upon seclusion is actionable against “one

⁹ *Barbieri v. News-Journal Co.*, 189 A.2d 773 (Del. 1963).

¹⁰ *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709 (Del. Super. Nov. 2, 1967).

¹¹ In oral argument, Plaintiffs and B.L. suggested that they would change their claims for intrusion upon to seclusion to public disclosure of private facts. There has been no amendment of the complaint. The claims remain for intrusion upon seclusion.

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns,” but only “if the intrusion would be highly offensive to a reasonable person.”¹² “Furthermore, comment c to § 652B states, ‘the defendant is subject to liability...only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs.’ Thus, the *sine qua non* of this variety of tort of invasion of privacy is clearly *intrusion*.”¹³

In *Beckett*, the Court granted summary judgment where a plaintiff engaged in a consensual relationship with a defendant under false pretenses represented by the defendant. Despite the fact that the plaintiff might not have opened her life up to the defendant had she known the truth, her consent meant that there was no intrusion.

The facts here, although different, present a similar circumstance. Plaintiffs and B.L. consented to the pictures being taken. Although they did so with an understanding that the pictures would remain private, a false pretense, there was no act of intrusion. Accordingly, Defendant’s motion for summary judgment of Plaintiffs’ and B.L.’s intrusion upon seclusion claims is **GRANTED**.

False Light (Count III)

In Count III of the complaint, Plaintiffs and B.L. allege that Defendant cast them in a false light. “False light invasion of privacy is giving publicity to something

¹² *Beckett v. Trice*, 1994 WL 710874 (Del. Super. Nov. 4, 1994) (quoting RESTATEMENT (SECOND) OF TORTS § 652B).

¹³ *Id.*

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

that places plaintiff in a false light before the public where the false light is highly offensive to a reasonable person, and knowing of or acting ‘in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.’”¹⁴

Plaintiffs and B.L. allege that Defendant’s publication of B.L.’s image placed them in a false light, because it suggested that they were in financial need. Moreover, they argue that the publication suggested that Plaintiffs exploit, and fail to protect, B.L. Notwithstanding Plaintiffs’ and B.L.’s assertions, the publication of the images does not convey the message that they suggest. Moreover, the publication would not be highly offensive to the reasonable person. In fact, it is more likely that the reasonable person would find the publication to have been complimentary. In any event, no “false light invasion” can be conjured under any reasonable interpretation of the facts. Defendant’s motion for summary judgment of Plaintiffs’ and B.L.’s false light claims is **GRANTED**.

Intentional Infliction of Emotional Distress (Count IV)

In Count IV of the complaint, Plaintiffs allege intentional infliction of emotional distress. “The elements of the tort of intentional infliction of emotional distress appear in Restatement (Second of Torts § 46 (1965) as follows: (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if

¹⁴ *Q-Tone Broadcasting, Co. v. Musicradio of Maryland, Inc.*, 1994 WL 555391 (Del. Super. Aug. 22, 1994) (quoting *Wyshock v. Malekzadeh*, 1992 WL 148002 (Del. Super. June 10, 1992)).

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

bodily harm to the other results from it, for such bodily harm.”¹⁵ “Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (A) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm.”¹⁶

Liability exists where the defendant’s conduct has been “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”¹⁷ “It is the Court’s responsibility to determine whether the defendant’s conduct is so extreme and outrageous as to permit recovery.”¹⁸ “Of course, where reasonable men might differ, it is for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability.”¹⁹

The complaint alleges that Defendant used B.L.’s image at a day care center for advertising purposes. This is not the type of conduct that this tort seeks to address. Reasonable people could not be said to differ on that topic. Indeed, the conduct alleged here would be complimentary to many, though evidently not to Plaintiffs. In

¹⁵ *Beckett*, 1994 WL 710874 at *4 (quoting RESTATEMENT (SECOND) OF TORTS § 46).

¹⁶ *Doe v. Green*, 2008 WL 282319 (Del. Super. Jan. 30, 2008) (quoting RESTATEMENT (SECOND) OF TORTS § 46).

¹⁷ *Mattern v. Hudson*, 532 A.2d 85 (Del. Super. 1987).

¹⁸ *Id.* at 86.

¹⁹ *Id.*

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

no case, though, could it be deemed reasonable to consider the conduct to be outrageous. Even if it were so, Plaintiffs have not satisfied the pleading requirements set forth in *Waterhouse*. Accordingly, Defendant's motion for summary judgment of Plaintiffs' intentional infliction of emotional distress claims is **GRANTED**.

Defendant's Motion For Summary Judgment of Count V

In Count V of the complaint, Plaintiffs allege Defendant breached a series of contract warranties. Specifically, Plaintiffs allege that Defendant breached express and implied warranties of privacy and implied warranties of good faith and honesty. According to Plaintiffs, Defendant provided an express warranty of privacy through the privacy policy posted online and an implied warranty of privacy because Mrs. Lee refused to sign the consent form. Plaintiffs contend that the implied warranties of good faith and honesty are afforded through Delaware's Uniform Commercial Code (UCC).

Any warranties provided to Plaintiffs by Defendant would have been in connection to the sale of the photographs. The predominant purpose of the agreement between the parties was for the photographs, not for the act of taking the photographs. Accordingly, the predominant purpose of the agreement was to facilitate a transaction in goods.²⁰ Because the sale was a transaction in goods, Article 2 of Delaware's UCC controls the nature and extent of the warranties.²¹ Article 2 recognizes express warranties and the implied warranties of merchantability and fitness for particular

²⁰ *Neilson Business Equip. Ctr., Inc. v. Italo V. Monteleone, M.D., P.A.*, 524 A.2d 1172, 1174 (Del. 1987).

²¹ *Id.*

purpose.²² “A claim for breach of warranty, express or implied, is conceptually distinct from a negligence claim, because the latter focuses on the manufacturer’s conduct, whereas a breach of warranty claim focuses on the product itself.”²³

Express Warranty

In a transaction in goods, an express warranty may be created by “any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain.”²⁴ Additionally, an express warranty may be created through “any description of the goods which is made part of the basis of the bargain” or by showing “any sample or model which is made part of the basis of the bargain.”²⁵

Plaintiffs argue that the written privacy policy on Defendant’s website created an express warranty that pictures taken by Defendant would be kept private. Plaintiffs point to three statements in the policy specifically. Those statements read as follows: 1) “We are committed to protecting your privacy;” 2) “We do not use your email address or other personally identifiable information to send marketing messages without your consent;” and 3) “Generally, we do not share personal information about you with other people or nonaffiliated companies without your consent.”

²² *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976).

²³ *Hyatt v. Toys R Us, Inc.*, 930 A.2d 928 (Del. 2007).

²⁴ 6 *Del. C.* § 2-313.

²⁵ *Id.*

The privacy policy did not create an express warranty. Under Article 2, an express warranty is created only when the affirmations or representations made related to the goods. In order for the policy to have created an express warranty in this case, the affirmations or representations therein must have, in some way or another, related to the nature or quality of the goods. Plaintiffs have presented no evidence to that effect. Additionally, the online policy did not address privacy of the photographs themselves.

In addition to the online policy, Plaintiffs argue that Mrs. Lee's refusal to sign the photographer's consent form created an express warranty of privacy. Even if one were to assume that Mrs. Lee's refusal was tantamount to an affirmation by Defendant, that representation would still not relate to the goods. There has been no affirmation by Defendant that relates to the photographs. There can, therefore, be no express warranty under Article 2 of Delaware's UCC.

Implied Warranties

Article 2 of Delaware's UCC provides two specific implied warranties. Those warranties are the implied warranty of merchantability and the implied warranty of fitness for particular purpose.²⁶ The implied warranty of merchantability is a warranty that the goods subject to a transaction will be merchantable.²⁷ Generally, goods are considered to be of merchantable quality when they are fit for their ordinary use.²⁸

²⁶ *Martin*, 353 A.2d at 584.

²⁷ 6 *Del. C.* § 2-314.

²⁸ *Id.*

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

Plaintiffs contend that the implied warranty of merchantability applies here because it is implied, in a contract for the sale of personal photographs, that the photographs will remain private. The circumstances about which Plaintiffs complain are not contemplated by the implied warranty of merchantability. The warranty seeks to address the quality of the goods themselves. Public disclosure of the photographs, even without consent, is not tantamount to a defect in the product itself.

Plaintiffs contend also that Defendant breached the implied warranties of good faith and honesty. In support thereof, Plaintiffs point to 6 *Del. C.* § 1-304 and 6 *Del. C.* § 1-201(b)(20). § 1-304 imposes an obligation of good faith upon the parties to a commercial transaction. That obligation requires good faith performance and enforcement of contract. § 1-201(b)(20) merely provides a definition of “good faith.” “Good faith” is therein defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”

Neither § 1-304 nor § 1-201(b)(20) establishes implied warranties. In fact, the obligation of good faith “does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, are medial [sic] right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”

_____The warranties that Plaintiffs allege to have been breached do not fit the facts of this case. In truth, Plaintiffs’ claims sound in tort, not in contract. The claims do not allege that the photographs were defective. Rather, the claims asserted in the complaint seek redress for what is more appropriately defined as negligence or appropriation. Regarding Count V, there is no genuine issue of material fact. Defendant’s motion for summary judgment of Count V is **GRANTED**.

Defendant’s Motion for Summary Judgment of Count VI

Count VI of Plaintiffs’ complaint alleges a violation of the Federal Magnuson Moss Act, codified as 15 *U.S.C.* § 2301 *et seq.* The Act establishes “a statutory cause of action for consumers for alleged warranty and consumer protection claims that may be filed in either state or federal court.”²⁹ It provides “guidelines with respect to written warranties” and prevents “attempts to disclaim implied warranties where a merchant has provided a written warranty.”³⁰ “Consumers who are damaged by the failure of a warrantor to comply with written or implied warranties may sue under the Act for damages and attorneys fees.”³¹

_____Defendant’s motion for summary judgment of this claim argues that there is no genuine issue of material fact, because the transaction between the parties did not involve a service contract or tangible personalty. In response, Plaintiffs suggest that

²⁹ *Mayew v. Chrysler, LLC*, 2008 WL 4447707 (Del. Super. Oct. 1, 2008).

³⁰ *Id.*

³¹ *McLaren v. Mercedes-Benz USA, LLC*, 2006 WL 1515834 (Del. Super. Mar. 16, 2006).

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

their claim is actionable under § 2310(d).

According to that provision, “a consumer who is damaged by the failure of a supplier, warrantor or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty or service contract may bring suit for damages and other legal and equitable relief.”³² The Act “contains substantive provisions other than breach of warranty claims” under which an aggrieved consumer may seek relief independent of State law.³³ Where a claim alleges breach of warranty, however, the claim is governed by applicable State warranty law.³⁴

Under the Act, “written warranty” has two definitions. First, it includes “any written affirmation of fact or written promise” that is made in connection with the sale of a consumer product, which “relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time.”³⁵ Second, it includes “any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace or take other remedial action with respect to such product in the event that such product fails to meet the

³² *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392 (3d Cir. 2004) (quoting 15 U.S.C. § 2310(d)(1)).

³³ *Hines v. Mercedes-Benz USA, LLC*, 358 F. Supp. 2d 1222, 1235 (N.D. Ga. 2005).

³⁴ *Cooper v. Samsung Electronics America, Inc.*, 2008 WL 4513924 (D.N.J. Sept. 30, 2008), *aff'd*, 374 Fed. Appx. 250, 254 (3d Cir. 2010).

³⁵ 15 U.S.C. § 2301(6).

specifications set forth in the undertaking.”³⁶ “The term ‘implied warranty’ means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.”³⁷

Plaintiffs allege that Defendant violated § 2310(d) because, according to the their response to Defendant’s motion, Defendant breached its express, written warranty of privacy together with its implied warranties of privacy, exclusive use of likeness and seclusion, good faith, fair dealing and honesty in fact. Plaintiffs allege that these warranties are implied under State law and Delaware’s UCC. Moreover, Plaintiffs allege that Defendant “created a deceptive warranty by attempting to exclude express warranties which as a matter of law cannot be disclaimed, pursuant to 15 U.S.C. § 2308(a) *et seq.*” To place these arguments into context, under the Act, Plaintiffs’ express and implied warranties allegations are governed by Delaware law while their disclaimer allegation is governed by § 2308.

Turning first to Plaintiffs express warranty and implied warranties claims, Plaintiffs have failed to establish a colorable claim for relief under the Magnuson Moss Act. As discussed above, Defendant provided no express warranties, and did not breach any of the implied warranties that are actionable under Delaware’s UCC. That finding alone warrants summary judgment of Plaintiffs’ Magnuson Moss Act claim in Defendant’s favor.

Moreover, as is the case under State law, the warranties that Plaintiffs allege

³⁶ *Id.*

³⁷ 15 U.S.C. § 2301(7).

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

to have been breached do not meet the definitions of express and implied warranties under the Magnuson Moss Act. As discussed above, under the Act, express warranties and implied warranties are those which are of or concerning the goods subject to the transaction. Express warranties are defined as such in § 2301 explicitly. Although that section's definition of an implied warranty refers us to State law definitions, when read in conjunction with the express warranty definition, a contrary conclusion seems illogical. Further, implied warranties are described as those made in respect to the consumer product in § 2308.

The warranties that Plaintiffs allege to have been breached do not concern the photographs or frames that were subject to the transaction. Rather, Plaintiffs seek relief for acts taken by Defendant. Accordingly, even if the warranties under which Plaintiffs seek relief existed under State law, they do not meet the statutory definitions set forth under the Magnuson Moss Act.

What is left is the alleged breach of § 2308. Subject to an exception, that section prohibits a supplier from disclaiming or modifying an implied warranty where the supplier provides "any written warranty to the consumer with respect to such consumer product."³⁸

Defendant never made such a written warranty. The only writings are the privacy policy on Defendant's website and the consent form that Mrs. Lee refused to sign. Neither of those was in respect to the photographs and frames as contemplated by the Act. Accordingly, Plaintiffs cannot establish a violation of the Act under that

³⁸ 15 U.S.C. § 2308(a).

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

provision. Defendant's motion for summary judgment of Count VI of the complaint is **GRANTED**.

Defendant's Motion for Summary Judgment of Count VII

In Count VII of the complaint, Plaintiffs allege that Defendant violated Delaware's Consumer Contracts Act. The Act prohibits a person, in a contract for the sale of merchandise, from engaging in a deceptive practice by knowingly or recklessly distorting or obscuring the terms, conditions or meaning of the contract or creating a likelihood of confusion or misunderstanding by the use of unintelligible words, phrases or sentences.³⁹ In the same breath, the Act prohibits a person from knowingly or recklessly omitting information required by law to be disclosed in the contract.⁴⁰

The Act provides a series of factors for the Court to consider in determining whether a contract is in compliance. Those include whether cross-references within the contract are confusing, whether sentences within the contract are unreasonably long or complex, whether sentences in the contract contain double negatives and exceptions to exceptions, whether sentences and sections in the contract are in a confusing or illogical order, whether the contract contains words with obsolete meanings or words that differ in their legal meaning from their ordinary meaning and "whether conditions, exceptions to the main provision of the agreement and protection for consumers or restrictions of consumers' rights are given equal

³⁹ 6 Del. C. § 2732.

⁴⁰ *Id.*

prominence with the main provision.”⁴¹

_____ Plaintiffs assert a claim for violation of the second portion of the Act. Specifically, the complaint alleges that “Defendant knowingly or recklessly took photographs of Plaintiffs and did not disclose that the photographs of Plaintiffs’ child would be used without Plaintiffs’ prior knowledge or consent.” It would seem that Plaintiffs suggest that Defendant’s intent to use the photographs for advertising must have been disclosed in the contract pursuant to “express and implied warranties of privacy, fair dealing, honest and the common law of privacy.”

The facts of this case are not the type which the Consumer Contracts Act seeks to address. The Act is concerned with written contracts that are constructed, intentionally or recklessly, to mislead consumers and with written contracts that omit, intentionally or recklessly, information required to be included. Here, the record is devoid of any evidence of intent or recklessness. Even considering the facts in a light most favorable to Plaintiffs, the allegations of the complaint amount to negligence at most.

Additionally, other than the presentation of the receipt, there is no suggestion that the contract between the parties was in writing. Even if the receipt could be construed as a written contract, Plaintiffs present no authority to suggest that a contract for family photography must include any provisions regarding privacy. Moreover, they present no suggestion of what those provisions would say.

_____ Plaintiffs have failed to present a *prima facie* showing of a violation of the

⁴¹ 6 *Del. C.* § 2733.

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

Delaware Consumer Contracts Act. Accordingly, there is no genuine issue of material fact. Defendant's motion for summary judgment of Count VII is **GRANTED**.

Defendant's Motion for Summary Judgment of Count VIII

Count VIII of the complaint alleges a violation of Delaware's Consumer Fraud Act. The Act prohibits "the act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby."⁴²

_____According to the complaint and Plaintiffs' response to Defendant's motion for summary judgment, Defendant violated the Act in three ways. First, Plaintiffs suggest that the online privacy policy misrepresented Defendant's efforts to maintain customer privacy. Second, Plaintiffs suggest that Defendant's use of the photograph for advertising, despite Mrs. Lee's refusal to sign a consent form, constituted a misrepresentation. Finally, Plaintiffs suggest that the Defendant's failure to inform Plaintiffs that it would use the photograph for advertising constituted an omission.

As discussed above, the online policy did not address privacy of customers' photographs. It dealt with privacy regarding information provided in conjunction

⁴² 6 Del. C. § 2513(a).

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

with Defendant's online services only. Accordingly, because Defendant did not commit an act contradictory to the policy, there was no misrepresentation.

Likewise, Plaintiffs' second and third points do not satisfy the statutory requirements. "Although the provisions of the Consumer Fraud Act are to be liberally construed, this Court must give effect to the language of the statute which restricts its application to deceptive practices 'in connection with the sale or advertisement' of the merchandise."⁴³ Here, even if the consent form and the omission satisfied the act or omission portion of the statute, they were not made in connection with the sale of the photographs. At the time Mrs. Lee was presented with the consent form, Defendant had already taken the photographs in question. In other words, the parties had already entered into contract. Essentially, the consent form and any omission were "post-sale" for the purposes of the Act. Accordingly, there is no genuine issue of material fact. Defendant's motion for summary judgment of Count VIII is **GRANTED**.

Defendant's Motion for Summary Judgment of Count IX

Count IX of the complaint seeks enhanced damages for the Counts alleged by B.L. pursuant to the Elder/Disabled Victims Penalties Act.⁴⁴ According to the Act, a defendant may be subject to enhanced penalties for committing certain illegal acts

⁴³ *Thomas v. Harford Mut. Ins. Co.*, 2003 WL 220511 (Del. Super. Jan. 31, 2003) (quoting *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of North America*, 558 A.2d 1066 (Del. Super. 1989)).

⁴⁴ 6 Del. C. § 2580 *et seq.*

against an elder or disabled victim.⁴⁵ The Act defines “elder persons” as those who are 65 years of age or older.⁴⁶ For a definition of a “person with a disability,” the Act refers to the definition thereof that is set forth in Delaware’s Fair Housing Act.⁴⁷ Delaware’s Fair Housing Act defines “disability,” with respect to a person, as “a physical or mental impairment which substantially limits one or more of such person’s major life activities.”⁴⁸

Defendant argues that B.L. is not covered under the Act because he is not over the age of 65 and not disabled. B.L. argues that he is disabled because, as a young child, he is unable to care for himself and, hence, restricted in a major life activity. In other words, B.L. suggests that every child under a certain age has “a physical or mental impairment which substantially limits one or more of such person’s major life activities.”

B.L.’s argument is not well taken. The Elder/Disabled Victims Act does not incorporate children into its definition of “disabled.” The definition in the Fair Housing Act speaks to “impairments.” Age is not an impairment. Moreover, as evidenced by the reference to persons age 65 and older, the Elder/Disabled Victims Act takes age into consideration already. If the Legislature intended to include children, that body could have done so. Accordingly, because B.L. does not meet the

⁴⁵ 6 *Del. C.* § 2583.

⁴⁶ 6 *Del. C.* § 2580.

⁴⁷ *Id.*

⁴⁸ 6 *Del. C.* § 4602(10).

Lee, et al., v. The Picture People
C.A. No: K10C-07-002 (RBY)
March 19, 2012

requirements for enhanced penalties, there is no genuine issue of material fact. Defendant's motion for summary judgment of Count IX is **GRANTED**.

CONCLUSION

Defendant's motion for summary judgment of Count I, as it pertains to B.L. only, is **DENIED**. With that exception, Defendant's motion for summary judgment of Counts I-IX is **GRANTED**.

SO ORDERED this 19th day of March, 2012.

/s/ Robert B. Young
J.

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