

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

KEVIN H. LONGINO, Individually and as Next Friend of Minor Children:	:	APPEAL NO. C-080905
JOHN DOE, JR., and JANE DOE, JR.,	:	TRIAL NO. A-0708090
	:	<i>JUDGMENT ENTRY.</i>
Plaintiffs-Appellants,	:	
vs.	:	
RADIO ONE, INC.,	:	
THE BUZZ 1230 AM WDBZ,	:	
MOJO 100.3 FM,	:	
101.1 WIZF,	:	
NATIONAL UNDERGROUND RAILROAD FREEDOM CENTER,	:	
and	:	
UFCW, Local 32D, ¹	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.²

A photograph of plaintiffs-appellants, Kevin Longino and his two minor children (collectively, “the Longinos”), was published in a flyer used to promote the

¹ The record does not indicate what the acronym UFCW represents.

² See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

fourth annual “Buzz Black Book Fair” of defendant-appellee 1230 AM WDBZ, a radio station known as “The Buzz.” The Longinos, upset that their permission was not obtained before their photograph was used, asserted claims for, inter alia, statutory and common-law misappropriation against The Buzz and other organizations that had sponsored, hosted, or promoted the book fair. The organizations that had promoted the book fair were defendants-appellees Radio One, Inc., and two radio stations affiliated with The Buzz, MOJO 100.3 FM and 101.1 WIZF. Defendant-appellee National Underground Railroad Freedom Center (“the Freedom Center”) hosted the event at its facility, and defendant-appellee UFCW, Local 32D, was alleged to have been one of the sponsors for the event.

In response to the lawsuit initiated by the Longinos, Blue Chip Broadcasting, Ltd. d/b/a Radio One, (“Blue Chip”) filed an answer on behalf of The Buzz and MOJO 100.3 FM, indicating that Blue Chip owned and operated both of these radio stations and that Blue Chip had been incorrectly identified in the complaint as Radio One, Inc. Because 101.1 WIZF, Radio One, Inc., and UFCW failed to answer the complaint in a timely manner, the Longinos filed motions for default judgment against those entities. The trial court denied these motions and allowed 101.1 WIZF to file an answer out of time. The trial court also granted Blue Chip’s motion to designate it as the proper party on behalf of the radio stations, as Blue Chip owned and operated The Buzz, 101.1 WIZF and MOJO 100.3 FM and was “doing business as” Radio One and not Radio One, Inc. Next, the trial court denied the Longinos’ motion for sanctions under Civ.R. 11 and Civ.R. 45 against Blue Chip.

During discovery, several depositions were taken. Geri Tolliver, the programming director for The Buzz who organized and planned the fourth annual

book fair, testified that the book fair was free for the public and was a “cultural event” to promote literacy. She testified that hosts for The Buzz, MOJO, and WIZF all promoted the event during broadcast hours. She stated that she had pulled several photographs from previous book fairs to use in the flyer to promote the current book fair. She testified that the photograph of the Longinos used in the flyer was taken at a prior book fair and that she had made no more than 100 copies of the flyer to post around town. She planned to post the flyers at libraries. Finally, Tolliver testified that she did not know Longino and his children when she approved their photograph for the flyer.

Annie Ruth Napier, a local artist who had volunteered at past book fairs, testified that she helped Tolliver create the flyer. She said that she chose the photograph of Longino and his children because it captured the spirit of the event, as the photograph showed “a program in [Longino’s] hand, and the children and the face painting, and there were the books there.” She testified that she did not know Longino.

Joyce Ann Gibson, a volunteer at The Buzz, testified that she had offered to pass out roughly 200 fliers at a local basketball game. Because Longino used to be a customer at her salon, she recognized him in the flyer, but did not tell Tolliver or anyone else at The Buzz.

James K. Anderson, a weekly talk-show host at The Buzz, testified that he and Longino were friends, but that he did not see a copy of the flyer with Longinos' photograph in it until June 2007, four months after the book fair.

Blue Chip and the Freedom Center both moved for summary judgment, which the trial court granted. The court denied the Longinos' motion for summary judgment.

The Longinos now appeal, bringing forth five assignments of error.

In their first assignment of error, the Longinos contend that the trial court erred by denying their motions for default judgment and by granting WIZF's motion for leave to file an answer out of time.

Under Civ.R. 6(B)(2), a trial court has the discretion to grant a motion for leave to file a pleading out of time if the court determines that the reason for the request to file out of time is due to "excusable neglect."³ The determination of whether neglect is excusable must take into consideration all the surrounding facts and circumstances, and courts must be mindful that cases should be decided on their merits, where possible, rather than on procedural grounds.⁴

After reviewing the record, we hold that the trial court did not abuse its discretion in granting Blue Chip's motion to file an answer for WIZF out of time. In its motion for leave to plead out of time, Blue Chip explained that WIZF's answer was untimely filed due to a clerical error of WIZF in failing to transmit the summons to Blue Chip. We note that Blue Chip filed its motion to respond out of time prior to the initial-case management conference. Considering these circumstances, we hold that the trial court did not err in granting Blue Chip's motion to file out of time.

We also hold that the trial court did not err in denying the Longinos' default-judgment motion against WIZF and Radio One, Inc. Blue Chip was designated as the proper party for all the radio stations in this action and thus replaced WIZF and

³ *Evans v. Chapman* (1986), 28 Ohio St.3d 132, 502 N.E.2d 1012.

⁴ *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 79-81, 514 N.E.2d 1122.

Radio One, Inc., as a named defendant. Given that Blue Chip was the proper party and had filed a timely answer, and being mindful that cases should be decided on their merits, we conclude that the default-judgment motion was properly denied. The trial court also properly denied the Longinos' default-judgment motion against the UCFW, as it is apparent from the remainder of the record that it did not participate in creating the flyer, and thus the Longinos could not show damages. Therefore, the first assignment of error is overruled.

In their second assignment of error, the Longinos maintain that the trial court abused its discretion by granting Blue Chip's motion to designate it as the proper party. We disagree. Attached to Blue Chip's motion was the affidavit of Linda Vilardo, the Vice President and Assistant Secretary of Blue Chip Broadcasting, Ltd., who stated that Blue Chip did business in Ohio as "Radio One" and not "Radio One, Inc." She further stated that Blue Chip owned the radio stations "1230 AM WDBZ, 100.3 FM WMOJ, and 101.FM WIZF." Given that this affidavit was not properly disputed, we hold that the trial court did not abuse its discretion in designating Blue Chip as the proper party for the radio-station defendants. The second assignment of error is overruled.

In their third assignment of error, the Longinos assert that the trial court erred by granting summary judgment in favor of Blue Chip and the Freedom Center on the Longinos' claims for common-law and statutory misappropriation, as well as their claims for negligence, freedom of expressive association, child exploitation, unjust enrichment, and intentional infliction of emotional distress. All of these remaining claims were based on the allegation that Blue Chip and the Freedom Center had misappropriated the Longinos' images.

Ohio has adopted the tort of misappropriation of the name or likeness of another as propounded by the Restatement of the Law 2d, Torts (1965).⁵ The Restatement provides, “The value of the plaintiff’s name is not appropriated by the mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation.”⁶

Here, the undisputed evidence demonstrated that the Longinos were depicted in the flyer at issue as members of the public who had previously attended a public book fair. Their names were not used in the flyer, and there was no evidence presented that the Longinos had a noteworthy reputation that would have benefited The Buzz, the organizer of the book fair. In fact, Napier, who chose the photograph to use in the flyer, testified that she did not know who the Longinos were and that their photograph had only been chosen because it best represented the spirit of the event. Because there was no evidence presented that Blue Chip and the Freedom Center gained any commercial benefit by using the Longinos’ photograph, we cannot say that the trial court erred by granting summary judgment to them on the common-law misappropriation claim.

With respect to the statutory misappropriation claim, we hold that the trial court also properly entered summary judgment in favor of Blue Chip and the Freedom Center. R.C. 2741.02 prohibits the use of “any aspect of an individual’s

⁵ *Zacchini v. Scripps-Howard Broadcasting Co.* (1976), 47 Ohio St.2d 224, 351 N.E.2d 424.

⁶ *Id.*, citing Restatement of the Law 2d, Torts (1965), Section 652(C).

persona for a commercial purpose.” Even if we were to assume that the use of the Longinos’ photograph in the flyer promoting the book fair was for a commercial purpose, the flyer fell within an exemption to statutory liability because the Longinos’ image was used to report an event of general or public interest—the free, public book fair—and the photograph of the Longinos was used to show unnamed members of the public who had attended previous book fairs.⁷

Additionally, we note, with respect to the Freedom Center, that summary judgment was also entered in its favor because it was undisputed that it did not sponsor the book fair, but merely hosted it at its facility, and had not participated in creating or distributing the flyer at issue.

Finally, summary judgment was properly entered on behalf of Blue Chip and the Freedom Center on the Longinos’ remaining claims, as each of those claims was based on the assertion that Blue Chip and the Freedom Center had improperly used the Longinos’ likenesses in the flyer to promote the book fair.

The third assignment of error is overruled.

In their fourth assignment of error, the Longinos argue that the trial court erred by denying their motion for attorneys fees and sanctions against Blue Chip under Civ.R. 37 and Civ.R. 45.

The Longinos argue that Blue Chip kept them from deposing a person named Cheryl Love, a former owner of Blue Chip and/or the radio stations that Blue Chip operated. The record demonstrates that the Longinos served Blue Chip with a notice to depose Love. But Blue Chip, by its vice-president’s affidavit, demonstrated that Cheryl Love was no longer an owner of Blue Chip and, therefore, was not an officer of

⁷ See R.C. 2741.09(A)(3).

Blue Chip or any of the radio stations that was a party to this action. Therefore, Blue Chip had no obligation to secure Love's presence at the deposition.

Because the record demonstrates that Love was not properly served with a subpoena, we cannot say that the trial court abused its discretion in denying the Longinos' motion for sanctions against Blue Chip. The fourth assignment of error is overruled.

In the fifth assignment of error, the Longinos argue that the trial court abused its discretion by denying their motions for sanctions under Civ.R. 11 and R.C. 2323.51 against Blue Chip and its attorney. We disagree.

The Longinos claim that Blue Chip filed and signed pleadings that it knew were untruthful. Though the Longinos do not specify what pleadings were untruthful, they infer that it was any pleading that stated that Blue Chip, not Radio One, Inc., was the proper party in this case.

We have reviewed the record and cannot say that Blue Chip acted in bad faith or frivolously by any filings that it made in this case, particularly in light of our holding that the trial court properly determined that Blue Chip was the proper party to defend this action. Accordingly, we overrule the Longinos' fifth assignment of error.

The judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., HILDEBRANDT and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 16, 2009
per order of the Court _____.

Presiding Judge