

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

LAURA BRAUN

: CASE NO.: A0803137

JEFFREY A. BRAUN

: (Judge Robert C. Winkler)

Plaintiffs,

:

vs.

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

KEVIN RHODES

:

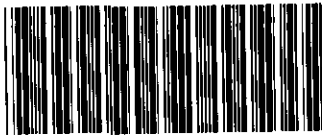
Defendants.

:

PATRICIA H. CLANCY
CLERK OF COURTS
HAMILTON COUNTY, OH
2009 MAR -9 1:38
FILED

Now comes defendant Kevin Rhodes and hereby moves this Court for an order for summary judgment on all claims of the plaintiffs. This motion is supported by the attached memorandum, the depositions of plaintiff Laura Braun, plaintiff Jeffrey Braun, defendant Kevin Rhodes and Detective William Roberts, and the pleadings filed herein.

Respectfully submitted,



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MEMORANDUM

I. STATEMENT OF CASE

A. Plaintiffs' Claims

Plaintiffs filed the Complaint in this matter on March 31, 2008. In that Complaint, plaintiffs allege that the defendant created and transmitted an e-mail that plaintiffs claim was defamatory and invaded their privacy. More specifically, plaintiffs allege that defendant sent out the allegedly defamatory e-mail in an attempt to humiliate, embarrass and harass plaintiffs. In their Complaint, plaintiffs allege defamation, invasion of privacy and identity theft. Plaintiffs also seek an injunction against defendant from engaging in behavior similar in nature to that alleged in the Complaint and make a request for punitive damages.

Needless to say, defendant denies these allegations and further denies that he sent the allegedly defamatory e-mail.

B. Statement of Facts

1. The Parties

Plaintiff Jeff Braun is a Sergeant with the Delhi Police Department.¹ Plaintiff Laura Braun is currently employed with the Mason City School District and had previously worked at the Oak Hills Local School District.² Laura Braun's father is a Trustee for Delhi Township and his name is Al Duebber.³ Kevin Rhodes ran for Township Trustee and has been critical of Mr. Duebber in the past expressing criticism through Letters to the Editor of the local

¹ Deposition of Jeff Braun at p. 8
² Deposition of Laura Braun at pp. 9-10
³ See Deposition of Laura Braun at p. 12

newspaper, *The Delhi Press*.⁴ Jeff Braun concedes that there is no secret that there is bitterness between his father-in-law and Mr. Rhodes.⁵

Kevin Rhodes is the son of Dusty Rhodes.⁶ He is currently employed by the City of Cincinnati as a building inspector.⁷ He is a political opponent of Al Duebber, the father of Laura Braun, and publishes letters in the *Delhi Press* concerning his dissatisfaction with the performance of Mr. Duebber in his public capacity as Delhi Township Trustee.⁸

2. The Allegedly Defamatory E-Mail

Laura Braun does not recall the first time she saw the e-mail at issue in this matter.⁹ She received a phone call from a friend asking her why Laura Braun had sent out an e-mail like this one.¹⁰ The friend who called her was Lisa Howrath and Ms. Howrath had received the e-mail in question.¹¹ She received a copy of the e-mail on January 8, 2008 at 2:38 p.m.¹²

Mrs. Braun immediately suspected Mr. Rhodes had sent it due to his sending letters to the editor and the way he has talked in the past and reacted to Mrs. Braun in public.¹³ Nobody indicated to Mrs. Braun that they definitively knew who they received the e-mail from except that it came from the e-mail address of MB-959@hotmail.com.¹⁴

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- ⁴ Deposition of Laura Braun at pp. 20-21
⁵ Deposition of Jeff Braun at p. 25
⁶ Deposition of Kevin Rhodes at p. 35
⁷ Deposition of Kevin Rhodes at pp. 61-62
⁸ Deposition of Kevin Rhodes at pp. 64-65
⁹ Deposition of Laura Braun at pp. 14-15, a copy of the e-mail is attached at Exhibit 1
¹⁰ Deposition of Laura Braun at p. 15
¹¹ Deposition of Laura Braun at p. 15
¹² Deposition of Laura Braun at p. 16
¹³ Deposition of Laura Braun at p. 19
¹⁴ Deposition of Laura Braun at p. 31

Initially, Mrs. Braun testified that she determined the IP address from the header of the e-mail that was forwarded to her by Mrs. Howard.¹⁵ She then changed her story and testified that she obtained the IP address with help from a neighbor who worked at Cincinnati Bell.¹⁶ Mrs. Braun then testified that Mr. Meavers was a computer whiz and he told her what the IP address was based off of an electronic copy of the e-mail.¹⁷ Jeff Braun did not know from whom the MB-959@hotmail.com address came.¹⁸ Mr. Braun had never seen that e-mail address before nor was he involved in obtaining the IP address.¹⁹ Detective William Roberts investigated the criminal complaint made by Laura Braun concerning the e-mail.²⁰ Detective Roberts testified that he does not remember if somebody forwarded him the actual e-mail or if someone forwarded him the header information or printed the header information for him.²¹

II. ARGUMENT OF LAW

A. Summary Judgment Standard

Summary judgment is proper under Civ.R. 56(C) when (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and, (3) *it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence viewed most strongly in favor of the party against whom the motion for*

¹⁵ Deposition of Laura Braun at pp. 33-35, 38

¹⁶ Deposition of Laura Braun at pp. 86-87

¹⁷ Deposition of Laura Braun at p. 87

¹⁸ Deposition of Jeff Braun at p. 13

¹⁹ Deposition of Jeff Braun at p. 18

²⁰ Deposition of William Roberts at pp. 16-20

²¹ Deposition of William Roberts at p. 27

summary judgment is made, that conclusion is adverse to the that party.²² The evidence supporting or opposing a motion for summary judgment must be based on facts that are *admissible in evidence*.²³

B. Plaintiffs Cannot Establish A Defamation Claim

Judgment is appropriate in defamation actions because whether the words are defamatory is a question of law.²⁴ To succeed on a claim of defamation, plaintiff must prove the elements of defamation: (1) a false and defamatory statement; (2) publication of the statement; (3) fault; and (4) harm.²⁵ The essential elements that must be met for a claim of defamation are that (1) defendant made a false statement; (2) that the false statement was defamatory in the sense that it reflected unfavorably on the plaintiff's character or injured his or her trade or business; (3) the statement was published or communicated; and, (4) the defendant acted with the necessary degree of fault.²⁶

In the instant case, plaintiffs' defamation claim fails because they cannot prove the *prima facie* elements of defamation. The first element that defendant made a false statement, has not been met by plaintiffs. A court must decide as a matter of law whether a certain statement alleged to be defamatory is actionable.²⁷ In Ohio, allegedly defamatory statements that constitute opinion enjoy an absolute privilege and may not give rise to a cause of action

²² Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317

²³ Civ.R. 56(E)

²⁴ Vail v. Plain Dealer Publishing Co. (1995), 72 Ohio St.3d 279

²⁵ Williams v. Gannett Satellite Information Network, Inc. (2005), 162 Ohio App.3d 596

²⁶ Hersch v. E.W. Scripps Co. (1981), 3 Ohio App.3d 367

²⁷ Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369, 372

for defamation.²⁸²⁹

Plaintiff Jeff Braun testified that his initial reaction to the e-mail was laughter because he thought it was stupid because obviously he did not write it. He believed that the e-mail was a parody or mock-off of the plaintiffs' Christmas card letter that had just been sent out.³⁰ Mrs. Braun testified that when she saw the e-mail, she instantly knew it was a mock-off of the Christmas letter she sends out every year.³¹ In fact, Mrs. Braun says that the e-mail is a complete spoof of her Christmas letter.³² She agrees that the e-mail was a parody of her Christmas letter.³³

Clearly, both plaintiffs testify that they saw the allegedly defamatory e-mail as a parody or mock-off of their annual Christmas card letter. Parodies are not false statements of fact, rather, they are statements of opinion, and as such, absolutely privileged against a claim of defamation. This is further buttressed by the fact that Detective Roberts testified that when he saw the e-mail he felt it was an obvious parody of the Christmas card letter.³⁴ The e-mail is clearly one of parody or satire and does not consist of factual, provable statements. Absent evidence of factual statements that were false by the defendant, plaintiffs are unable to demonstrate defamation. Therefore, summary judgment should be granted to the defendant.

As for the last two elements of a defamation claim, plaintiffs have not produced

²⁸ Vail, supra at 281.

²⁹ Deposition of Jeff Braun at pp. 13-14

³⁰ Deposition of Jeff Braun at p. 26

³¹ Deposition of Laura Braun at p. 45

³² Deposition of Laura Braun at p. 52, a copy of the Christmas letter is attached at Exhibit 2

³³ Deposition of Laura Braun at p. 53

³⁴ Deposition of William Roberts at pp. 30-31

admissible evidence that defendant published a statement or acted with the necessary degree of fault. Putting aside whether the e-mail contains false statements of fact, plaintiffs' evidence allegedly connecting the defendant to the publication of the e-mail is non-existent. Plaintiff Laura Braun testified that she somehow obtained an IP address from an electronic copy of the e-mail, however, she could not explain how she did that and then gave changing explanations as to how she did it and who was involved in assisting her in doing that. Detective Roberts testified that he could not recall how he got the IP address. He testified that he either obtained it himself or somebody sent it to him. Clearly those are contradictory statements and Detective Roberts could not identify which statement was true. Next, there is no admissible evidence in the record that the IP address allegedly obtained from an electronic copy of the e-mail belongs to the defendant. Plaintiffs and Detective Roberts all testified that they did not connect the IP address to the defendant and there is no evidence in the record to demonstrate that it did belong to the defendant. Therefore, plaintiff is not able to meet the *prima facie* elements of a defamation action and it should be dismissed.

C. There Has Been No Invasion Of Privacy

Ohio recognizes three types of actions for invasion of privacy.³⁵ An actual invasion of the right of privacy is the unwanted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern or the wrongful intrusion to one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.³⁶ In their Complaint,

³⁵ Housh v. Peth (1956), 165 Ohio St. 35

³⁶ Id. at ¶ 2 of Syllabus

plaintiffs allege that the statements of the defendant invaded their privacy and violated their right to live peacefully.³⁷ In reviewing these allegations, it appears that it is the third type of invasion of privacy claim that plaintiffs are making, that is, the defendant wrongfully intruded into the plaintiffs' private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation.

As noted above, there is no evidence that the defendant did anything to invade plaintiffs' privacy. There is no connection between the e-mail at issue and the defendant. In fact, plaintiff Laura Braun has testified that she sought no medical attention, medical treatment or counseling as a result of seeing the e-mail.³⁸ Accordingly, the invasion of privacy claims fails.

D. Plaintiffs Have No Identity Theft Cause of Action

In their Complaint, plaintiffs allege that the defendant stole the identity of the plaintiffs by impersonating them in using their names in referring to the plaintiffs' family members as belonging to the defendant. They then go on to allege that defendant is liable to plaintiffs for damages for these actions. There is no case law or applicable statute that expresses a civil cause of action called identity theft. Some sections of the Consumer Sales Practices Act have a goal of curtailing the problem of identity theft, however, they do not state a private cause of action for identity theft.³⁹ Moreover, as noted above, there is no admissible evidence in the record that the defendant had any connection to the e-mail or that the e-mail constitutes identity theft. Conclusory allegations in a complaint are insufficient to survive a summary

³⁷ Plaintiffs' Complaint, ¶¶ 17, 19
³⁸ Deposition of Laura Braun at p. 49
³⁹ See R.C. §1349.18

judgment motion. Moreover, the plaintiffs have produced no evidence of damages on this claim. Mrs. Braun testified that there has been no economic loss as a result of any identity theft.⁴⁰ Accordingly, summary judgment is warranted on plaintiffs' identity theft claim.

III. CONCLUSION

For the foregoing reasons, the defendant's summary judgment motion is well-taken. Plaintiffs have failed to produce admissible evidence, as is their burden, on their claims of defamation, invasion of privacy and identity theft. Plaintiffs concede that the allegedly defamatory e-mail was an act of parody of their annual Christmas letter. As such, it does not meet the *prima facie* elements of a defamatory statement. Furthermore, plaintiffs have not produced evidence on their invasion of privacy claim because, among other things, they have not produced admissible evidence connecting the defendant to the e-mail publication. Therefore, defendant respectfully requests grant its motion for summary judgment and dismiss the plaintiffs' claims with prejudice and at the costs of the plaintiffs.

Respectfully submitted,



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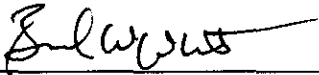
⁴⁰ Deposition of Laura Braun at p. 65

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was mailed this 9th day of March, 2009, to:

Charles A. Brigham, III
4931 Delhi Pike
Cincinnati, OH 45238
Attorney for Plaintiffs

McCaslin, Imbus & McCaslin

By: 

MCCASLIN, IMBUS
& MCCASLIN
A LEGAL PROFESSIONAL ASSOCIATION
632 VINE STREET, SUITE 900
CINCINNATI, OHIO 45202-2442

----- Original Message -----

From: <lhowarth@zoomtown.com>
To: "Laura Braun" <lbraun@fuse.net>
Sent: Monday, January 07, 2008 6:39 PM
Subject: Fwd: Happy New Year everyone

- > From: MB 959 <mb-959@hotmail.com>
- > To: <mb-959@hotmail.com>
- > Subject: Happy New Year everyone
- > Date: Sat, 5 Jan 2008 20:08:09 -0500
- >
- >
- >
- > Happy New Year everyone. We went to one of many of our very, very rich
- > friends homes New Years Eve.
- > Anyway, for New Years Eve we went to Frisch's and had dinner, of course we
- > paid the whole bill (\$22.88) because we are givers.
- > Jesus was a giver too.
- >
- > Next we went to the compound (Boss Hogg's) with the kids.
- > They had snacks and bottled water but my dear husband Jeff only drank the
- > water. He is a marathon runner you know?
- > Three miles a day.
- >
- > OMG, mother and dearest father had their dog Duchess (she is 13 and
- > riddled with cancer) in a silk sleeper that they had custom made
- > while traveling. Mother (Lulu) and father (Boss Hogg) dressed their new
- > yellow Labs Colby-Duke and Chloe like Roscoe P. Coltrane
- > and Daisy Duke. Roscoe was all over Daisy, humpin' and bumpin'. At one
- > point we had to throw cold water on them.
- > OMG, I was soo embarrassed.
- >
- > The New Year had just rung in so we went home gave the children some warm
- > low fat milk and read them a passage from the Bible.
- > Jeff and I said a few prayers together and then made passionate love
- > (missionary position, anything more is a sin).
- >
- > Happy New Year,
- > Laura & Jeff Braun
- >
- > Our family will pray for your less fortunate family.
- >
- >
- >
- >
- >
- > Get the power of Windows + Web with the new Windows Live.
- > http://www.windowslive.com?ocid=TEXT_TAGHM_Wave2_powerofwindows_012008



I am absolutely amazed at how quickly life is passing all of us by. I remember my dad telling me to quit wishing my life away and he was so right – I couldn't wait to be 21 and now I am facing turning 33. This year has been rather chaotic for our family. I decided to return to college at the Mount and will graduate with my Master's degree in Special Education in May of 2008. I was hired full-time as an Aide at the Highlander Academy in the Oak Hills School District and am interviewing for a long-term sub position on January the 4th at Oakdale Elementary (keep your fingers crossed – this would be a great opportunity for me)! I would like to thank my family and friends for all of their support this past year as I literally have had no time to do anything and have really slacked off with keeping in touch with everyone. I am happy to report that I just received my grades and have a 4.0 GPA. This makes the \$40,000.00 college loan well worth it! (Who am I kidding – just think of what I could have done with that money??) I would especially like to thank my mom for always being so willing to help me with the kids on Saturdays while I sit in class all day. I love you so much and appreciate all of your help and support!! You are truly the best mom ever!!

Jeff has been on day shift for the last year and will be transferred to 3rd shift starting January 19th. He is really looking forward to this as this is his favorite shift to work. He has been busy coaching Andrew basketball, Allie's soccer and taking Andrew to Cub Scouts. He continues to run about 3 miles a day and is currently re-painting Andrew's room. He has been a huge help to me and is very supportive of me working full-time and attending graduate school full-time – I could not have done this without him! I am so thankful and grateful to have him for my husband and best friend. I truly could NOT ask for more.

Allie is a very active 3rd grader. She just turned 9 on October 26th. She loves playing soccer and even made a select team this year, which has kept us very busy. Right now she is playing on an indoor team that plays once a week at the Western Hills Sports Mall. She was also picked by her teacher's to help with the kids in the Special Needs classroom where she helps them develop their social skills. Her grades are phenomenal and she is one of the happiest kids that I have ever met. She loves watching Hannah Montana and the Suite Life of Zach and Cody and enjoys playing outside and rollerblading. She is a true grandma's girl and loves spending time with her in any way she can! (I never thought that I would have a child who would love going to Gatlinburg without me!!! She is truly *not* her mother's child – if you know what I mean!?)

Andrew (or Buddy as we call him) is a BIG first grader this year and has really done well. He is learning to read and loves anything sports related and playing on the computer. He is currently on a basketball team for St. Dominic and has made several amazing shots from the 3-point line. He is very handy and loves to work with his dad around the house on projects. He is also very pleased with the new additions at Grandma Debbie and Papa Al's house – 2 new beautiful yellow labs named Colby Duke and Chloe. Unfortunately we just learned that Dutchess (who is their 13 year-old chocolate lab) has cancer and won't be with us much longer so getting the new dogs could not have come at a better time.

We know that we are truly blessed and thank God for all of our good health and many, many blessings. We hope that all is well with each of you and wish you a very Merry Christmas and Happy New Year!

Love,

Jeff, Laura, Allie and Andrew Braun