

**IN THE SUPREME COURT OF OHIO
2021**

TODD A. SAMMONS,	:	
	:	Case No.:
<i>Plaintiff-Appellant,</i>	:	
	:	On Appeal from the
-vs-	:	Licking County Court of Appeals,
	:	Fifth Appellate District
KEYSTONE AMERICA, INC.,	:	
	:	Court of Appeals Case No.:
<i>Defendant-Appellee.</i>	:	2021 CA 00038

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT
TODD A. SAMMONS**

James P. Tyack (0072945) (COUNSEL OF RECORD)
Madison Mackay (0096678)
THE TYACK LAW FIRM CO., LPA
536 South High Street
Columbus, Ohio 43215
Telephone: (614) 221-1341
Email: James@tyacklaw.com
Email: Madison@tyacklaw.com

COUNSEL FOR PLAINTIFF-APPELLANT TODD A. SAMMONS

Alycia N. Broz (0070205)
Daniel E. Shuey (0085398)
VORYS, SATER, SEYMOUR AND PEASE, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216
Telephone: (614) 464-5481
Email: anbroz@vorys.com
Email: dshuey@vorys.com

COUNSEL FOR DEFENDANT-APPELLEE KEYSTONE AMERICA, INC.

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST i

STATEMENT OF FACTS..... 3

STATEMENT OF CASE 4

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW 6

PROPOSITION OF LAW I: An individual seeking statutory damages under O.R.C. § 2741.07 for a violation of the unauthorized use of his persona under O.R.C. § 2741.02 may be awarded damages on a “per” violation basis...... 6

CONCLUSION 15

CERTIFICATE OF SERVICE 16

APPENDIX

Opinion of the Fifth Appellate District, Licking County
(October 28, 2021)..... Appx. 001

Judgment Entry of the Fifth Appellate District, Licking County
(October 28, 2021)..... Appx. 013

Licking County Common Pleas Judgment Entry
(April 10, 2017)..... Appx. 014

Licking County Common Pleas Judgment Entry
(May 29, 2020)..... Appx. 017

Licking County Common Pleas Judgment Entry
(May 7, 2021)..... Appx. 025

**EXPLANATION OF WHY THIS CASE IS ONE OF
PUBLIC OR GREAT GENERAL INTEREST**

This appeal presents a question of first impression: does O.R.C. § 2741.07 allow for recovery of statutory damages on a “per” violation basis? In fact, only three Ohio courts have addressed this question; first, the Franklin County Court of Common Pleas, and now the Licking County Court of Common Pleas and the Fifth District Court of Appeals through this present action. In the present matter, Defendant-Appellee violated O.R.C. § 2741.02 by using Plaintiff-Appellant’s persona in connection with two funeral homes for years and in many different forms. Specifically, the trial court confirmed Plaintiff-Appellant’s persona has commercial value and was used by Defendant-Appellee for commercial purposes without Plaintiff-Appellant’s consent in obituaries, YPM directories and phonebooks, funeral home locations signage, funeral home websites, website advertising, and employment listings. (May 28, 2020, JE, p. 8).

Despite these numerous, perpetual violations of O.R.C. § 2741.02 by Defendant-Appellee, both the trial court and the Fifth District Court of Appeals found Plaintiff-Appellant’s right to statutory damages under O.R.C. § 2741.07 is capped at \$10,000 to include all violations ever committed by Defendant-Appellee. The trial court and Fifth District’s decision significantly impairs the General Assembly’s intentions in enacting O.R.C. § 2741.01 *et seq.* for the purpose of creating a “right of publicity in an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance (*persona*) if that aspect of the persona has commercial value.” *Digest of Enactments 1999*. Ohio Legislative Service Commission. March 2000.¹ Indeed, “the right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or her identity.” *ETW*

¹ <https://www.lsc.ohio.gov/documents/reference/archives/digestofenactments/99digest.pdf>

Corp. v. Jireh Publishing, Inc., 332 F.3d 915, 928 (6th Cir.2003). The Southern District of Ohio put it succinctly by stating “[t]he right to publicity prevents others from depleting the economic value of one's persona without internalizing the costs.” *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 929 (N.D. Ohio 2004). Limiting an individual’s ability to collect statutory damages for numerous continuous, ongoing, and perpetual unauthorized uses of his persona effectively inhibits his inherent right to control the commercial use of his persona. In the present case, the damages cap effectively depletes the value of Plaintiff-Appellant’s persona without Defendant-Appellee internalizing any of the cost. Defendant-Appellee’s violations have not simply diminished the value; rather, their perpetual violations have *depleted* the value all for the small price of \$10,000.

Specifically, the trial court noted that Plaintiff-Appellant’s persona certainly does have commercial value. This unextinguished commercial value has been conferred upon Defendant-Appellee without authorization for nearly six years due to these continued violations. Nevertheless, the trial court and appellate court’s decisions have provided no incentive to stop Defendant-Appellee’s unlawful beneficial use of Plaintiff-Appellant’s persona. A cap on the award of statutory damages to \$10,000 for any and all violations allows a violator’s misappropriation to continue unfettered. Such unfettered violation flies directly in the face of the objective of the statutorily affirmed right to publicity: to *control* the use of one’s persona for commercial purpose.

In the present matter, since the trial court’s initial holding that a cap of \$10,000 existed regardless of the number of violations, their extent, frequency, or severity, Plaintiff-Appellant has completely lost control over the use of his persona for commercial profit. Instead, despite his attempt to utilize the law to enforce his inherent right, Plaintiff’s right to publicity has been continuously and incessantly violated for over six years. Should the trial court and appellate court’s

ruling on this issue stand, more individuals will be denied their right to control the use of their persona because a violator will have little to no disincentive to stop.

STATEMENT OF FACTS

Plaintiff-Appellant Todd Sammons managed two funeral homes in Central Ohio owned by Defendant-Appellee Keystone America, Inc. until his employment terminated on January 4, 2014. (May 5, 2020, JE, p. 2). During his employment, Plaintiff-Appellant was paid \$15,000 annually for the use of his persona in the naming, advertising, and operation of the two funeral homes. (Plt. Aff. for MSJ, ¶ 4). Pursuant to his Employment Agreement, this authorized use continued for one year following the separation of employment: December 31, 2015. (May 5, 2020, JE, p. 2). Nevertheless, Plaintiff-Appellant discovered Defendant-Appellee continued to utilize his persona without authorization beyond December 31, 2015, including the signage outside both funeral home locations. (Plt. MSJ, p. 2).

Plaintiff-Appellant and Defendant-Appellee subsequently entered into a supplemental agreement to allow the use of his persona for an additional two months (January 2015-February 2015) in exchange for a one-time compensation of \$2,500. *Id.* By the expiration of this agreement, Plaintiff-Appellant discovered the signs had not been changed and his persona continued to appear in many of Defendant-Appellee's websites, advertisements, obituaries, directories, and phone books approved and paid for by Defendant-Appellee's. *Id.*

Through counsel, Plaintiff-Appellant sent three separate cease and desist letters to Defendant-Appellee regarding the unauthorized use of his persona. *Id.* at p. 3. Despite being on notice that it was to cease using Plaintiff-Appellant's persona and likeness beginning on March 1, 2015, Defendant-Appellee continued to do so even after receiving the cease-and-desist letters. *Id.* In fact, there were thirteen (13) separate and distinct yellow and white page publications that were

disseminated or circulating after March 1, 2015, bearing Plaintiff-Appellant's name and persona without his authorization and paid for by Defendant-Appellee. *Id.* Plaintiff-Appellant's persona appeared in five additional directories from 2015-2018 circulated in the Licking and Knox County area. *Id.* Moreover, Plaintiff-Appellant's persona was published in a total of 234 obituaries. *Id.* In addition, a job advertisement posted on Defendant-Appellee's website ran from March 6, 2017, through June 20, 2017, seeking a funeral director and listing the Pataskala funeral home as "Kauber-Sammons." *Id.*

To this day, Plaintiff-Appellant's persona and likeness have continued to appear on over ninety-four (94) different websites. *Id.* This includes a page for "Kauber-Sammons Funeral Home" and "Crouse-Kauber-Sammons Funeral Home" on Facebook, which featured photos updated by the page curator as late as January 4, 2019. Additionally, to this day, Mapquest continues to display a pinpoint location and address for "Kauber-Sammons Funeral Home." *Id.* Agents from Defendant-Appellee made efforts in October of 2018 to have four websites remove Plaintiff-Appellant's persona, but otherwise made no other efforts. (Tr. Beth Wagner, p. 15-34).

STATEMENT OF CASE

On October 16, 2015, Plaintiff-Appellant Todd Sammons filed his Complaint against Defendant SCI Ohio Funeral Services, Inc (later substituted for Defendant-Appellee Keystone America, Inc. on June 20, 2016) in the Licking County Court of Common Pleas in the case captioned 2015 CV 0881. Plaintiff-Appellant's Complaint alleged Defendant-Appellee has violated O.R.C. § 2741.02 and a common law claim for misappropriation of name or likeness.

On February 13, 2017, Defendant-Appellee filed a Partial Motion for Summary Judgment arguing that upon demonstration of a meritorious claim for violation of O.R.C. § 2741.02, statutory damages provided for in O.R.C. § 2741.07 were limited to a maximum amount of \$10,000 on a

single violation basis rather than a “per” violation basis. On April 10, 2017, the trial court granted Defendant-Appellee’s Partial Motion for Summary Judgment, finding that statute limited statutory damages to “the” violation and not “per” violation. On October 16, 2018, Plaintiff-Appellant voluntarily dismissed his Complaint against Defendant-Appellee pursuant to Ohio Civ. R. 41(a).

On February 19, 2019, Plaintiff-Appellant timely refiled his Complaint against Defendant-Appellee alleging the same two claims in the case caption 2019 CV 0192 with the Licking County Court of Common Pleas. On March 6, 2020, Plaintiff-Appellant filed a Motion for Reconsideration of the April 10, 2017, Entry granting Defendant-Appellee’s Partial Motion for Summary Judgment and a Partial Motion for Summary Judgment as to the merits of Plaintiff-Appellant’s claims under O.R.C. § 2741.02. On May 28, 2020, the trial court granted Plaintiff-Appellant’s Partial Motion for Summary Judgment finding that Defendant-Appellee had violated O.R.C. § 2741.02, stating “plaintiff’s persona has commercial value and that the defendant used plaintiff’s persona for commercial purposes without his consent as it relates to: YPM directories and phonebooks, funeral home locations signage, funeral home websites, website advertising, and employment listings.” (May 28, 2020, Entry, p. 8). Within the same entry, the trial court denied Plaintiff-Appellant’s Motion for Reconsideration as to damages.

On April 30, 2021, the trial court denied Defendant-Appellee’s Motion to Prohibit Plaintiff from Seeking Punitive Damages at Trial or, in the Alternative, to Bifurcate. The trial court determined that an election of statutory damages under R.C. 2741.07 in lieu of actual damages did not preclude a plaintiff from seeking punitive damages under the statute.

On May 5, 2021, the Appellant and Appellee filed a stipulated joint entry holding Appellant was entitled to \$10,000 in statutory damages and that Appellee had violated O.R.C. § 2741.02 more than one time. On May 25, 2021, Appellant timely filed an appeal of the May 5, 2021, Entry,

the April 10, 2017, denial of his Motion for Reconsideration, and the April 10, 2017, Entry Granting Appellee’s Motion for Partial Summary Judgment to the Fifth District Court of Appeals. Defendant-Appellee filed a conditional cross-appeal of the April 30, 2021, Entry Denying its Motion to Prohibit Plaintiff from Seeking Punitive Damages at Trial or, in the Alternative, to Bifurcate. The Fifth District held Plaintiff-Appellant’s entitlement to statutory damages under O.R.C. § 2741.07 is capped at \$10,000 regardless of the number of found violations of O.R.C. § 2741.02. Accordingly, the Fifth District regarded Defendant-Appellee’s cross-appeal as moot and did not issue a ruling on the merits.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW I: An individual seeking statutory damages under O.R.C. § 2741.07 for a violation of the unauthorized use of his persona under O.R.C. § 2741.02 may be awarded damages on a “per” violation basis.

Relevant to the present case, the Ohio Legislature has codified the common law tort of misappropriation of name and/or likeness with O.R.C. § 2741 *et seq.* Under the statute, no person shall use an individual’s persona for a commercial purpose without prior written consent. O.R.C. § 2741.02. The subject of this appeal, however, focuses solely on the damages provided by statute for a violation of O.R.C. § 2741.02. An individual whose persona has been misappropriated under the statute may recover actual damages in a civil action or, alternatively, statutory damages. Specifically, the statute provides,

At the election of the plaintiff and in lieu of actual damages, statutory damages in the amount of at least two thousand five hundred dollars and not more than ten thousand dollars, as determined in the discretion of the trier of fact, taking into account the willfulness of the violation, the harm to the persona in question, and the ability of the defendant to pay a civil damage award. . .

O.R.C. § 2741.07(A)(1)(a). In the case at bar, Defendant-Appellee’s Partial Motion for Summary Judgment hinges on the interpretation of “the violation.” Defendant-Appellee’s interpretation,

adopted by the lower courts in this matter, limits statutory damages to a maximum of ten thousand dollars (\$10,000) for all violations of O.R.C. § 2741.02 by a defendant to be encompassed under one single violation. Plaintiff-Appellant's interpretation allows for an award of statutory damages for each distinct and separate violation taking into account the volume of violations by a defendant. Additionally, prior to receiving damages, a plaintiff must prove each element of a violation. The plain text of the statute, its context, principles of statutory interpretation, and logic all require the statute to be read to allow for multiple awards of statutory damages.

When considering the meaning of a statute, the court's first step is always to determine whether the statute is "plain and unambiguous." *State v. Hurd*, 89 Ohio St.3d 616, 618, 734 N.E.2d 365 (2000). If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. Ambiguity, in the sense used in the Ohio Supreme Court's opinions, means that a statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16. Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. § 1.49 is inappropriate." *Id.*; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, 28 N.E.3d 81, ¶ 10. The Court does "not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994).

"[W]ords in a statute do not exist in a vacuum." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 19. A court, therefore, must remain

careful not to “pick out one sentence and disassociate it from the context.” *Black–Clawson Co. v. Evatt*, 139 Ohio St. 100, 104, 38 N.E.2d 403 (1941). Instead, the court must focus on everything within “the four corners of the enactment” in order to “determine the intent of the enacting body.” *Id.* A court’s attention should be directed beyond single phrases, and it should consider, in proper context, all words used by the General Assembly. *D.A.B.E., Inc.*, 96 Ohio St.3d 250, ¶ 19.

In the present case, the statutory language unambiguously allows for the award of statutory damages for multiple violations not to be capped at ten thousand dollars. However, if this Court concludes that the statute at issue, O.R.C. § 2741.07, is unclear, indefinite or subject to various interpretations – then the rules of statutory construction must be applied in order to arrive at the legislative intent. An interpretation allowing for damages on a per violation basis is supported by the context of O. R.C. § 2741 *et seq.* and the legislature’s intent.

In order to arrive at the legislative intent, this Court must apply the rules of statutory construction. Specifically, in determining legislative intent, it is the duty of the court to give effect to the words used, not to delete or insert words. *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991). Words and phrases must be read in context and construed according to the rules of grammar and common usage. *Indep. Ins. Agents of Ohio, Inc. v. Fabe*, 63 Ohio St.3d 310, 314, 587 N.E.2d 814 (1992), quoting R.C. 1.42.

The crux of this matter is the phrase “the violation” as utilized in O.R.C. §2741.07 as it relates to the award of statutory damages. First, the use of the word “the,” modifying the singular word “violation,” indicates that the legislature intended that a single violation would warrant statutory damages between \$2,500 and \$10,000. Defendant-Appellee’s interpretation may have been correct had the legislature, in contrast, used the words “the violations” instead of “the violation.” As it has done in many other statutory provisions, the legislature often distinguishes

between the singular and the plural.² Had the legislature intended a single award of statutory damages to be allowed for all violations regardless of number and frequency, it would have used the plural of the term; however, the legislature quite plainly chose to use “violation” in its singular form.

Second, “the violation” appears in the statutory provision listing factors to be considered by a court in an award of statutory damages. Precisely, O.R.C. § 2741.07(A)(1)(b) instructs the trier of fact to determine statutory damages by “taking into account the willfulness of the violation, the harm to the persona in question, and the ability of the defendant to pay a civil damage award.” These “factors” are as instructive for what they entail as they are for what they do not. Specifically, the factors do not instruct the trier of fact to take into consideration the *extent, frequency, number, duration*, or any other factor pertaining to the number of occurrences of the violations or the time period over which any violations have taken place. Limiting statutory damages to \$10,000 fails to take into consideration the extent, frequency, number, and duration of violations entirely, essentially giving a defendant carte blanche to violate a plaintiff’s property rights in his own persona.

The common law tort of misappropriation of name/likeness or right of publicity as codified in O.R.C. 2741.02 is “an intellectual property right of recent origin which is the inherent right of every human being to control the commercial use of his or her identity.” *Harvey v. Sys. Effect, LLC*, 2020-Ohio-1642, 154 N.E.3d 293, ¶ 58 (2d Dist.)(quoting *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir.1983)). Explicitly, other courts have found

² See, e.g., R.C. 1315.15 (“A statement of the violation or violations”); R.C. 1121.32 (the same); R.C. 1315.152 (the same); R.C. 1321.51 (“ . . . after receiving notice of the violation or violations”); R.C. 4735.181 (“ . . . of the alleged violation or violations”); R.C. 3713.09 (“Submit evidence of the violation or violations”); R.C. 3937.19 (“ . . . harmed by the violation or violations,”); 4735.16 (“ . . . shall give notice to the licensee of the alleged violation or violations”).

[L]aws governing the right to publicity have a substantial interest in regulating commercial speech. Individuals have a property right in their own identity. Allowing individuals the exclusive right to capitalize on their persona, like copyright law, encourages them to invest in developing their skills and talents. The right to publicity prevents others from depleting the economic value of one's persona without internalizing the costs.

Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 929 (N.D. Ohio 2004).

Limiting damages for liability to \$10,000 regardless of the extent, frequency, number, or duration of violations gives plaintiff's no tangible control over the commercial use of his or her identity. As evidenced by this case, where Defendant-Appellee's use of Plaintiff-Appellant's persona has continued unauthorized for nearly six years, a cap on statutory damages to encompass all violations does not deter violations of the statute. Plaintiff-Appellant presented credible evidence in his Motion to Reconsider filed two years after the trial court's initial ruling on damages that Defendant-Appellee received a green light to continue their violation of the statute, which it has proceeded to do. Essentially, this limitation gives the cause of action no teeth and the legislative intent of creating a cause of action to uphold the property right of every human being to control the commercial use of his or her identity is defeated. Such an interpretation runs contrary to the legislature's intent in creating the cause of action.

Additionally, Defendant-Appellee's interpretation of the statute confounds the use of "violation" in O. R.C. § 2741.07(C) regarding the statute of limitations for a cause of action under O.R.C. § 2741.02. O.R.C. § 2741.07(C) expressly provides that "[a]n action under this section shall be brought within four years of *a violation* of section 2741.02 of the Revised Code." The legislature's use of "a violation" as opposed to "violations" clearly indicates that the statutory damages provision was intended to apply on a per violation basis. Indeed, Defendant-Appellee's interpretation of the relevant provision – that the statutory damages provision provides the total amount available for all violations, regardless of the number – would then beg the question as to

when the statute of limitations begins to run where, as is here, the defendant has committed multiple, ongoing and distinct violations. Thus, Defendant-Appellee's interpretation of the statute is not supported by the plain text of the statute, its context, principles of statutory interpretation, or logic, and thus, must be rejected by this Court.

The trial court and the Fifth District summarily concluded that had the General Assembly intended statutory damages to be awarded on a "per violation" basis, it would have explicitly used that language. Nevertheless, Ohio courts have interpreted "the violation" language to allow for multiple awards of statutory damages for multiple violations. For example, in regard to the Ohio Consumer Sales Practice Act, O.R.C. § 1345.09 reads "[w]here *the violation* was an act prohibited by section 1345.02, 1345.03, or 1345.031 of the Revised Code, the consumer may, in an individual action, rescind the transaction or recover the consumer's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages." Explicitly missing from the statute is the "per violation" language written by the General Assembly.

However, implicitly, courts have interpreted "the violation" of O.R.C. § 1345.09 to allow for damages on a "per violation" basis. *See e.g., Crye v. Smolak*, 110 Ohio App.3d 504, 511, 674 N.E.2d 779 (10th Dist.1996). In *Crye*, the Tenth District found a petitioner could collect statutory damages, without a showing of actual damages, under O.R.C. § 1345.09 on a per violation basis even though the damages statute reads "the violation" if they were separate CSPA rule violations caused by separate acts. *Id.* In the case at bar, O.R.C. § 2741.02 does not have multiple rules to violate as the CSPA does, but the separate action analysis applied by the Tenth District and other courts should apply. Defendant-Appellee, as determined by the trial court, violated O.R.C. § 2741.02 for many years through many different media forms, including "obituaries, YPM directories and phonebooks, funeral home locations signage, funeral home websites, website

advertising, and employment listings.” (May 28, 2020, Entry, p. 8). Contrary to the appellate court’s contention, the explicit use of “per violation” by the Legislature is not required.

Moreover, legislatures are capable of including all violations under the umbrella of a single violation if so desired when it comes to statutory damages. *See e.g.* 17 U.S.C.S. 504. In a similar statutory scheme as to the one at issue in this case, Congress enacted the Copyright Act, which allows the owner of a copyright to collect actual damages or statutory damages within a range for the infringement of that copyright. Specifically, “the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages *for all infringements involved in the action*, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.” *Id.* (emphasis added). Just as Plaintiff-Appellant has one persona, a copyright owner may have just one work, but Congress explicitly included all infringements of that one work into one single statutory damages award. Such an explicit limitation is not found in O.R.C. § 2741.07.

The trial court and Fifth District erroneously negate Plaintiff-Appellant’s interpretation of the statute holding it would allow a “windfall” of damages for an individual. Specifically, the Fifth District stated, “we find it could not have been the intent of a legislature to award potentially millions of dollars in damages with no correlation to the actual commercial value to the defendant or harm caused to the plaintiff simply by stacking multiple uses of the plaintiff’s name for a single commercial venture.” (October 28, 2021, JE, p. 10). However, it is obvious that the intent of the General Assembly was to give individuals a right of action to present their claim, through proof of violations, to a jury to determine the appropriate damages for the benefit gained and harm done by

violating O.R.C. § 2741.02. This intent coincides with an individual's constitutional right to a trial by jury on their claims. Ohio Const. Art. 1, § 5.

First, allowing an award of statutory damages on a per violation basis inherently correlates to the harm caused to the plaintiff. As is the case for Plaintiff-Appellant, a per violation award specifically correlates to the years of repeated and perpetual violations by Defendant-Appellee. Second, a per violation interpretation still comports with the purpose of the statute by allowing a jury to determine the number, frequency, and severity of violations warranting an award of damages. Such issues are presented to the jury to determine if a use is separate and distinct enough to warrant an award of damages if proven by a plaintiff.

In sum, there is very little Ohio case authority regarding actions brought under O.R.C. § 2741.02 and specifically no causes brought in the Ohio Supreme Court. *Harvey v. Sys. Effect, LLC*, 2020-Ohio-1642, 154 N.E.3d 293, ¶ 54 (2d Dist.). As such, this is a case of first impression. In support of its conclusion that the statutory award is capped at \$10,000 regardless as to the frequency, duration and number of unauthorized uses of an individual's persona, the trial court and the Fifth District cited and relied upon the Franklin County Court Common Pleas decision in *Lahm v. Three Dog Films, LLC*, Franklin C.P. No.: 09-CVC-09-13724, 2011 Ohio Misc. LEXIS 17838 (Sep. 30, 2011). The foregoing decision carries no weight, is not binding on this court and is entirely distinguishable from the facts and circumstances of Defendant-Appellee's numerous, independent, separate, and ongoing unauthorized uses of Plaintiff-Appellant's persona for its commercial purposes in this instant matter.

The defendants in *Lahm*, supra, used the plaintiff's persona in a *single* advertising campaign for Tri-State Racetrack and Gaming Center, that was eventually known as the "Show Us Your Poker Face" campaign without his consent. *Id.* at *4. The Show Us Your Poker Face

campaign resulted in 525 media advertisements appearing in print media, on billboards, in television commercials and on the casino's website. *Id.* The Show Us Your Poker Campaign began in August 2008 and lasted until defendants received a cease-and-desist letter from plaintiff in December 2009. *Id.* at *6, *59.

The defendants in *Lahm* argued that because the 525 media advertisements fell under the umbrella of a single media campaign and otherwise constituted numerous concurrent violations, “the use of Plaintiff’s image in the “Show Us Your Poker Face” advertising campaign could constitute, at most, one “violation.”” *Id.* at *25. Reflecting on the undisputed facts presented and the statutory language of O.R.C. § 2741.07, the Franklin County Common Pleas Court held, “the Court finds the statute does not provide for a separate award of statutory damages for each billboard on which Plaintiff’s image appeared or for each TV commercial that aired, as Plaintiff argues. Rather, the statute provides for one award of statutory damages for the unauthorized use of Plaintiff’s image in the casino advertising campaign.” *Id.* at *57 (emphasis supplied).

The case at bar does not present facts of *concurrent* related unauthorized uses of Plaintiff-Appellant’s persona under a common purpose or scheme. Rather, Defendant-Appellee engaged in numerous, independent, separate, and *consecutive* unauthorized uses of Plaintiff-Appellant’s persona for commercial purposes that occurred before and even during the pendency of the litigation. O.R.C. § 2741.01, *et seq.* is a strict liability statute that is to be liberally construed to regulate commercial speech to protect and ensure an individual’s privacy and persona is not infringed upon and misappropriated. *See, Beverly v. Beverly*, 33 Ohio App.2d 199 (6th Dist. 1973), paragraph two of the syllabus (“R.C. § 2741.02 is a remedial statute and the proceedings thereunder are to be liberally construed...”)

Perhaps most importantly, unlike the defendants in *Lahm*, Defendant-Appellee continues to utilize Plaintiff-Appellant's persona after receipt of multiple cease-and-desist letters and the initiation of litigation, including a refiling of the cause of action by Plaintiff-Appellant for the continued unauthorized use of his persona. Defendant-Appellee has continued to utilize Plaintiff-Appellant's persona without authorization. Such conduct is unrelated and distinct from Defendant-Appellee's prior unauthorized use of Plaintiff-Appellant's name on its funeral home signage and within yellow page advertisements after his employment and the Naming Rights Agreement ended. Moreover, and according to Defendant-Appellee's untenable position, it could continue to use Plaintiff-Appellant's persona in perpetuity, even following the conclusion of this lawsuit, and would not be subject to any additional statutory liability since res judicata would theoretically apply. Any holding that Plaintiff-Appellant's statutory damages are capped at \$10,000 is contrary to the plain text of the Statute, the object sought to be obtained from the enactment of the Statute, and common sense.

CONCLUSION

Plaintiff-Appellant Todd A. Sammons respectfully requests that this Court accept jurisdiction and allow this appeal to proceed for briefing and argument on the merits.

Respectfully submitted,

THE TYACK LAW FIRM CO., L.P.A.

/s/ James P. Tyack

James P. Tyack (0072945)

Madison Mackay (0096678)

536 South High Street

Columbus, Ohio 43215

Telephone: (614) 221-1342

Facsimile: (614) 228-0253

Email: james@tyacklaw.com

Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December 2021, a copy of the foregoing has been delivered via electronic mail to *Counsel for Defendant-Appellee*, Alycia N. Broz (abroz@vorys.com) and Daniel E. Shuey (dshuey@vorys.com), this 9th day of December 2021.

/s/ James P. Tyack

James P. Tyack (0072945)

Madison Mackay (0096678)

THE TYACK LAW FIRM CO., L.P.A.

Attorney for Plaintiff-Appellant

APPENDIX

Opinion of the Fifth Appellate District, Licking County (October 28, 2021).....	Appx. 001
Judgment Entry of the Fifth Appellate District, Licking County (October 28, 2021).....	Appx. 013
Licking County Common Pleas Judgment Entry (April 10, 2017).....	Appx. 014
Licking County Common Pleas Judgment Entry (May 29, 2020).....	Appx. 017
Licking County Common Pleas Judgment Entry (May 7, 2021).....	Appx. 025

CLERK OF COURTS
OF APPEALS
LICKING CO. OHIO
2021 OCT 28 PM 2:02
OLIVIA C. PARKINSON
CLERK

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TODD SAMMONS

Plaintiff-Appellant /
Cross-Appellee

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Patricia A. Delaney, J.
Hon. Earle E. Wise, Jr., J

-vs-

Case Nos. (2021 CA 00038) &
2021 CA 00039

KEYSTONE AMERICA, INC.

Defendant-Appellee /
Cross-Appellant

OPINION

CHARACTER OF PROCEEDINGS:

Appeal from the Licking County Court of
Common Pleas, Case Nos. 2015 CV
0881 & 2019 CV 0192

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellant

JAMES P. TYACK
MADISON MACKAY
The Tyack Law Firm Co., LPA
536 South High Street
Columbus, Ohio 43215

For Defendant-Appellee

ALYCIA N. BROZ
DANIEL E. SHUEY
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216

53
621

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

2

Hoffman, P.J.

{11} Plaintiff-appellant Todd Sammons appeals the judgment entered by the Licking County Common Pleas Court awarding him damages in the amount of \$10,000 from Defendant-appellee Keystone America, Inc. for use of Appellant's persona for commercial purposes in violation of R.C. 2941.02. Appellee has filed a conditional cross appeal.

STATEMENT OF THE FACTS AND CASE

{12} Appellant worked at two funeral homes in Licking County, which were purchased by Appellee. While Appellant was employed, both funeral homes used Appellant's last name, "Sammons," as a part of the name of the funeral home.

{13} Appellant's employment with Appellee terminated in 2014. Appellee paid Appellant \$15,000 for the right to use his name in connection with the two funeral homes until December 31, 2014. By agreement, the parties later extended the use of Appellant's name to February 28, 2015.

{14} On October 16, 2015, Appellant filed a lawsuit alleging Appellee improperly used his name for commercial purposes beyond the February 28, 2015 deadline in violation of R.C. 2741.02. Appellee moved for partial summary judgment, arguing any statutory damages awarded for violation of R.C. 2741.02 should be capped at \$10,000, pursuant to R.C. 2741.07. The trial court granted the motion, finding pursuant to R.C. 2741.07(A)(1)(b), the maximum amount of damages awarded, should Appellant elect to receive statutory damages rather than prove actual damages, is \$10,000 in total, and not \$10,000 for each instance or medium on which Appellant's name was used. Appellant dismissed his case without prejudice on October 16, 2018, one week before trial.

622

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

3

{15} Appellant refiled the action in 2019. On March 6, 2020, Appellant moved the court to reconsider its summary judgment entered in the 2015 case, capping statutory damages at \$10,000 regardless of the number of individual violations of R.C. 2741.02. Appellant also filed a motion for partial summary judgment. The trial court granted the motion for partial summary judgment, finding in pertinent part:

Further, the Court finds that plaintiff's persona has commercial value and the defendant used plaintiff's persona for commercial purposes without his consent as it relates to: obituaries, YPM directories and phonebooks, funeral home locations signage, funeral home websites, website advertising, and employment listings. Damages shall be determined at trial.

{16} Judgment entry, May 28, 2021.

{17} Appellant notified the court he was electing to receive statutory damages in lieu of actual damages pursuant to R.C. 2941.07. Appellee filed a motion in limine asking the court to declare Appellant, having elected to receive statutory damages, was prevented from seeking punitive damages and presenting evidence of same at trial. The trial court overruled Appellee's motion.

{18} The parties entered into an agreed judgment filed May 7, 2021. Appellee stipulated to two violations of the statute regarding use of Appellant's name on funeral home signage, while Appellant continued to maintain via stipulation, despite the trial court's grant of partial summary judgment which left only damages for determination at trial, the precise number of violations must be determined by the trier of fact if the Court

623

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

4

of Appeals ordered remand. Appellee stipulated to damages of \$10,000, and the trial court awarded Appellant damages in the amount of \$10,000.

{¶9} Appellant filed two identical notices of appeal, both bearing both the trial court case numbers from 2015 and 2019, and both purporting to appeal from the same judgment entries of the trial court, assigned appellate case numbers 2021 CA 00038 and 2021 CA 00039. This Court consolidated the cases, with 2021 CA 00038 controlling. Appellee filed a notice of cross appeal under case number 2021 CA 00038.

{¶10} It is from the April 10, 2017, May 29, 2020, and May 7, 2021 judgments of the trial court Appellant prosecutes his appeal, assigning as error:

I. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT HOLDING PLAINTIFF'S STATUTORY DAMAGES TO BE CAPPED AT \$10,000 FOR ALL VIOLATIONS OF O.R.C. §2741.02 BY DEFENDANT.

II. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE APRIL 10, 2017 ENTRY GRANTING DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT AS TO THE STATUTORY DAMAGES CAP IN LIGHT OF NEW EVIDENCE OF CONTINUED VIOLATIONS BY DEFENDANT OF O.R.C. §2741.02.

{¶11} Appellee filed a notice of cross appeal, setting forth a single conditional assignment of error;

624

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

5

THE TRIAL COURT ERRED WHEN IT DENIED KEYSTONE'S MOTION TO PROHIBIT MR. SAMMONS FROM SEEKING PUNITIVE DAMAGES ON TOP OF HIS STATUTORY DAMAGES.

I., II.

{¶12} We address Appellant's assignments of error together, as both raise the issue of whether the trial court erred in finding statutory damages capped at \$10,000, regardless of the number of individual violations of the statute.

{¶13} R.C. 2941.02 provides:

(A) Except as otherwise provided in this section, a person shall not use any aspect of an individual's persona for a commercial purpose:

- (1) During the individual's lifetime;
- (2) For a period of sixty years after the date of the individual's death;

or

(3) For a period of ten years after the date of death of a deceased member of the Ohio national guard or the armed forces of the United States.

(B) A person may use an individual's persona for a commercial purpose during the individual's lifetime if the person first obtains the written consent to use the individual's persona from a person specified in section 2741.05 of the Revised Code. If an individual whose persona is at issue has died, a person may use the individual's persona for a commercial purpose if either of the following applies:

625

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

6

(1) The person first obtains the written consent to use the individual's persona from a person specified in section 2741.05 of the Revised Code who owns the individual's right of publicity.

(2) The name of the individual whose persona is used was the name of a business entity or a trade name at the time of the individual's death.

(C) Subject to the terms of any agreement between a person specified in section 2741.05 of the Revised Code and a person to whom that person grants consent to use an individual's right of publicity, a consent obtained before the death of an individual whose persona is at issue remains valid after the individual's death.

{¶14} In granting Appellant's partial motion for summary judgment, the trial court found Appellee violated this statute in the following ways: obituaries, YPM directories and phonebooks, funeral home locations signage, funeral home websites, website advertising, and employment listings. Although Appellant continues to maintain there are more instances of use of his name for the trier of fact to determine at trial, and Appellee stipulated to only two violations regarding funeral home signage, neither party has appealed the trial court's grant of partial summary judgment on this issue.

{¶15} In this case, Appellant elected to receive statutory damages in lieu of proving actual damages in accordance with R.C. 2741.07, which provides in pertinent part:

626

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

(A)(1) A person who violates section 2741.02 of the Revised Code is liable in a civil action to the person injured by the violation for the following:

(a) Actual damages, including any profits derived from and attributable to the unauthorized use of an individual's persona for a commercial purpose as determined under division (A)(2) of this section;

(b) At the election of the plaintiff and in lieu of actual damages, statutory damages in the amount of at least two thousand five hundred dollars and not more than ten thousand dollars, as determined in the discretion of the trier of fact, taking into account the willfulness of the violation, the harm to the persona in question, and the ability of the defendant to pay a civil damage award;

(c) If applicable pursuant to section 2315.21 of the Revised Code, punitive or exemplary damages.

(2) The trier of fact shall include any profits derived from and attributable to the unauthorized use of an individual's persona for a commercial purpose in calculating the award of actual damages under division (A)(1)(a) of this section.

{¶16} The trial court determined this statute capped statutory damages at \$10,000, regardless of the number of times and the variety of ways in which Appellee violated R.C. 2741.02 with regard to the use of Appellant's name in conjunction with its funeral home operations.

627

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

8

{¶17} This appears to be a case of first impression in Ohio appellate courts. However, the trial court cited to a Franklin County Common Pleas Court decision in *Lahm v. Three Dog Films, LLC*, Franklin C.P. No. 09 CVC-09-13724 (September 30, 2011). In *Lahm*, the plaintiff's likeness had been used in commercials for a casino without his consent. The plaintiff argued his image was used a total of 525 times via internet advertising, billboards, television, magazines, newspapers, and in-casino ads. He argued he could receive statutory damages between the amounts of \$2,500 and \$10,000 for each of these 525 uses pursuant to R.C. 2741.07(A)(1)(b). The trial court rejected the plaintiff's argument, holding:

Although this case presents an issue of first impression with respect to the number of statutory damages awards allowable pursuant to R.C. §2741.07 – one per unauthorized use or a single award for the unauthorized use in general – the Court finds R.C. §2741.07 is not ambiguous and the Court need not resort to the rules of statutory interpretation in answering the question. The statute clearly provides for an award of damages, between \$2,500 and \$10,000, for *the* violation, not *per* violation. The Court finds well taken Defendants' argument that the plain language of the statute provides for a single award of statutory damages for the violation, not for multiple awards of statutory damages, one for each violation or unauthorized use, particularly when compared to other statutes that expressly provide for damages to be determined *per* violation. In other words, the Court finds the statute does not provide for a separate award of statutory damages for each

628

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

9

billboard on which Plaintiff's image appeared or for each TV commercial that aired, as Plaintiff argues. Rather, the statute provides for one award of statutory damages for the unauthorized use of Plaintiff's image in the casino advertising campaign.

{¶18} *Id.* at 36.

{¶19} We agree with the reasoning of the Franklin County Common Pleas Court, adopted by the trial court in the instant case. The Ohio Revised Code is replete with language specifically providing a remedy or penalty for each separate violation, or "per violation." See, e.g., R.C. 903.16, 903.17, 1322.50, 1751.45, 3794.07, 3916.19, 3961.08, 6109.23. Had the legislature intended each individual action taken in violation of R.C. 2741.02 to constitute a separate violation with a separate damage award of \$2,500 to \$10,000, it could have said so, as it did in other sections of the Revised Code.

{¶20} Further, under Appellant's theory, he could be awarded as much as \$4.5 million in statutory damages for the number of individual violations in this case. Appellant's theory that each separate use of his name in an obituary, a phone directory, an internet advertisement, etc. is a separate violation entitling him to a separate damage award of \$2,500 to \$10,000 is an argument with no limit. What constitutes each violation? Is it the internet ad itself, or is the number of "hits" the internet ad received? Is the signage in front of the funeral home a single violation, or is each car which drives past the funeral home and views the sign a separate violation? The potential award of damages is nearly limitless, which could not be the intent of the legislature with regard to statutory damages.

629

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

10

{¶21} The statute allows an aggrieved party to prove actual damages, which in a given case could far exceed the \$10,000 cap of statutory damages. However, we find it could not have been the intent of the legislature for a party who is unable to prove actual damages to be entitled to millions of dollars in damages based on multiple publications of the same use of his name, in this case, in conjunction with the naming of the funeral home. Implicit in R.C. 2741.07's provision for statutory damages is a recognition even if an aggrieved party is unable to prove the commercial value of their name to the defendant or unable to prove the damages incurred as a result of improper use of their name, a person's name has inherent worth, and damages are appropriate. However, we find it could not have been the intent of a legislature to award potentially millions of dollars in damages with no correlation to the actual commercial value to the defendant or harm caused to the plaintiff simply by stacking multiple uses of the plaintiff's name for a single commercial venture.

{¶22} In *State ex rel. Ware v. Akron*, 2021-Ohio-624, a records requestor filed a writ of mandamus in the Ohio Supreme Court, asking the court to award statutory damages in the amount of \$2,000. The statute in question allowed for statutory damages in the amount of \$1,000 for failure to timely reply to a public records request. Ware alleged he was entitled to \$2,000 because he served two separate records requests. The court held Ware was only entitled to \$1,000, because "the fact that he spread his public-records requests across two letters does not automatically mean that each letter constitutes a separate request for purposes of calculating statutory damages. *Id.* at ¶22. The court found R.C. 149.43(C)(1) "does not permit stacking of statutory damages based on what is essentially the same records request." *Id.* While not directly on point as *Ware* dealt

630

1304517249 Fifth District 16

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

11

with a different statute, we find the decision analogous to the instant case. Appellant is not seeking statutory damages for individual violations of R.C. 2741.02, but rather is seeking to stack statutory damages for a single commercial use of his name without his consent in conjunction with the operation of the funeral home. We note while Appellant cited to numerous instances of use of his name without his consent in his complaint, his complaint included a single cause of action for violation of R.C. 2741.02.

{¶23} We find the trial court did not err in limiting Appellant's award of statutory damages to \$10,000.

{¶24} The first and second assignments of error are overruled.

{¶25} Appellee's assignment of error on cross appeal is conditional on our reversal of the case based on Appellant's assignments of error. Because we have overruled both of Appellant's assignment of error, we find the cross appeal is rendered moot.

631

Licking County, Case Nos. 2021 CA 00038 & 2021 CA 00039

12

{¶26} The judgment of the Licking County Common Pleas Court is affirmed. Costs of the direct appeal are assessed to Appellant. Costs of the cross appeal are assessed to Appellee.

By: Hoffman, P.J.
Delaney, J. and
Wise, Earle, J. concur

William B. Hoffman

 HON. WILLIAM B. HOFFMAN

Patricia A. Delaney

 HON. PATRICIA A. DELANEY

Earle E. Wise Jr.

 HON. EARLE E. WISE, JR.

632

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CLERK OF COURTS
OF APPEALS
LICKING CO. OHIO
2021 OCT 28 PM 2:04
OLIVIA C. PARKINSON
CLERK

TODD SAMMONS
Plaintiff-Appellant /
Cross-Appellee

-vs-

KEYSTONE AMERICA, INC.
Defendant-Appellee /
Cross-Appellant

JUDGMENT ENTRY

Case No. 2021 CA 00038

For the reasons stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas, is affirmed. Costs of the direct appeal are assessed to Appellant. Costs of the cross appeal are assessed to Appellee.

William B. Hoffman
HON. WILLIAM B. HOFFMAN

Patricia A. Delaney
HON. PATRICIA A. DELANEY

Earle E. Wise Jr.
HON. EARLE E. WISE, JR.

53
633

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Todd A. Sammons,

Plaintiff,

v.

Keystone America, Inc.,

Defendant.

LICKING COUNTY
COMMON PLEAS COURT
APR 10 P 4:01
FILED
CLERK OF COURT

CASE NO. 15 CV 00881

JUDGMENT ENTRY

This matter is before the Court on Defendant's Motion for Summary Judgment, Plaintiff's Memorandum in Opposition, and Defendant's Reply.

Plaintiff has asserted a claim against defendant for use of his persona for commercial purposes pursuant to R.C. 2741.02. Pursuant to R.C. 2741.07, plaintiff may pursue actual damages or, in lieu of actual damages, elect statutory damages. R.C. 2741.07(A)(1)(b) states:

At the election of the plaintiff and in lieu of actual damages, statutory damages in the amount of at least two thousand five hundred dollars and not more than ten thousand dollars, as determined in the discretion of the trier of fact, taking into account the willfulness of the violation, the harm to the persona in question, and the ability of the defendant to pay a civil damage award;

Defendant moves the Court for a determination that the statute provides for only one award of damages up to \$10,000 for violation of R.C. 2741.02, not an award for each instance or medium in which plaintiff's persona was used. Plaintiff argues that, should he elect statutory damages, damages should be available for each instance his persona was used.

There appears to be no appellate court precedent regarding this issue. The parties cite a Franklin County Common Pleas case that has addressed the matter. *Lahm v. Three Dog Films, LLC*, Franklin C.P. No. 09 CVC-09-13724 (Sept. 30, 2011). The Court agrees with the decision of that case that the statute does not provide for multiple statutory damage awards.

"[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard v. Canton City School Bd. Of Edn.*, 97 Ohio St.3d 451, 454, 2002-Ohio-

Judge
Thomas M. Marcelain
740-670-5777

Judge
W. David Branstool
740-670-5770

Courthouse
Newark, OH 43055

6718. "If [a statute] is ambiguous, we must then interpret the statute to determine the General Assembly's intent. If it is not ambiguous, then we need not interpret it; we must simply apply it." *State v. Hairston*, 101 Ohio St.3d 308, 310, 2004-Ohio-969.

As the Court stated in *Lahm*:

the Court finds R.C. §2741.07 is not ambiguous and the Court need not resort to the rules of statutory interpretation in answering the question. The statute clearly provides for an award of damages, between \$2,500 and \$10,000, for *the* violation, not *per* violation. The Court finds well taken Defendants' argument that the plain language of the statute provides for a single award of statutory damages for the violation, not for multiple awards of statutory damages, one for each violation or unauthorized use, particularly when compared to other statutes that expressly provide for damages to be determined *per* violation.

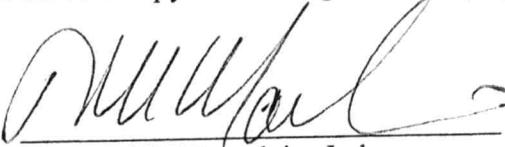
As the *Lahm* Court noted above and defendant noted in its motion, the legislature has expressly provided the language "per violation" in many other statutes. (See Defendant's Motion for Summary Judgment at 3 fn. 2).

Nonetheless, even if the Court were to determine that the statute is ambiguous, it would reach the same conclusion. As defendant argues, it does not logically follow that the legislature would create a windfall in statutory damages where plaintiff could not sufficiently establish actual damages. The statute gives a plaintiff the option of choosing statutory damages in the event his damages are small or cannot be adequately demonstrated.

Accordingly, defendant's motion for summary judgment is GRANTED. The elective statutory damages may not exceed \$10,000.

It is so ORDERED.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.


Thomas M. Marcelain, Judge

Copies to:

Alycia N. Broz, Esq., Christopher C Wager, Esq., Attorney for Defendant
Vorys, Sater, Seymour and Pease LLP, 52 E. Gay St., P.O. Box 1008, Columbus, OH 43216-1008

James P. Tyack, Esq., Ryan Thomas, Esq., Attorneys for Plaintiff
The Tyack Law Firm Co., LPA, 536 S. High St., Columbus, OH 43215

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

Todd A. Sammons,

Plaintiff,

v.

Keystone America, Inc.,

Defendant.

CASE NO. 19 CV 00192

JUDGMENT ENTRY

2019 MAY 29 PM 3:10
LICKING COUNTY
COMMON PLEAS COURT

I. NATURE OF THE PROCEEDINGS

This matter is before the Court on plaintiff's motion for partial summary judgment, defendant's memorandum in opposition, and plaintiff's reply. For the reasons set forth below, the motion is granted. Plaintiff also moved the Court to reconsider the April 10, 2017 decision granting defendant's motion for partial summary judgment regarding damages. That motion is denied.

II. STANDARD OF REVIEW

Rule 56(C) of the Ohio Rules of Civil Procedure sets forth the standard this Court applies when construing a motion of summary judgment:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is proper if, after construing the evidence most strongly in favor of the nonmoving party, reasonable minds could come to but one conclusion in favor of the moving party. Civ.R. 56; *Horton v. Hardwick Chem. Corp.*, 73 Ohio St.3d 679, 686-687 (1995). The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996).

Judge
Thomas M. Marcelain
740-670-5777

Judge
W. David Branstool
740-670-5770

Courthouse
Newark, OH 43055

Once the moving party satisfies its initial burden, the nonmoving party “may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

III. CONCLUSIONS OF LAW

Plaintiff has asserted a claim against defendant, Keystone America, Inc. (“Keystone”) for use of his persona for commercial purposes pursuant to R.C. 2741.02. Plaintiff was previously employed as a location manager overseeing two funeral homes in Central Ohio until his separation with Keystone on January 4, 2014. Pursuant to plaintiff’s employment contract, Keystone was permitted to use plaintiff’s persona through December 31, 2014. Plaintiff alleges that Keystone continued to use his persona after December 31, 2015. On February 7, 2015, plaintiff and Keystone entered into an Agreement on Naming Rights which granted Keystone the right to display the plaintiff’s name and likeness on its advertising and otherwise in connection with the two funeral homes for an additional two months. (January 2015-February 2015). Plaintiff asserts that Keystone continued to use his persona after February 2015.

The plaintiff first brought suit against Keystone in October 2015. *See Sammons v. Keystone*, 2015 CV 00881. That case was ultimately dismissed by the plaintiff. Prior to the dismissal, Keystone filed a motion for partial summary judgment on the narrowed legal issue as to whether plaintiff’s statutory damages are capped at \$10,000. Pursuant to a Judgment Entry filed on April 10, 2017, this Court found that R.C. 2741.07 is “clear and unambiguous”

and “does not provide for multiple statutory damage awards.” (Judgment Entry at 12). The plaintiff now requests that this Court reconsider its previous ruling.

R.C. 2741.02(A)(1) provides in relevant part that “...a person shall not use any aspect of an individual’s persona for a commercial purpose during the individual’s lifetime unless consent is given.” Written consent includes “written, electronic, digital, or any other verifiable means of authorization.” R.C. 2741.01(F). Plaintiff contends that he did not give consent past the supplemental agreement for the months of January 2015- February 2015. This fact was not disputed by Keystone.

Next, the statute defines “persona” as an individual’s “name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects has commercial value.” R.C. 2141.01(A). Accordingly, the plaintiff must establish that “there is value in associating an item of commerce with [their] identity.” *Roe v. Amazon.com*, 714 F.App’x 565,568 (6th Cir. 2017).

Keystone contends that plaintiff’s persona does not contain “commercial value.” Keystone argues that plaintiff’s name was used only because as a funeral home, they were statutorily obligated to keep plaintiff’s name as part of the funeral home itself pursuant to R.C. 4717.11(B) for a period of two years following the plaintiff’s departure. However, a closer look at R.C. 4117.11(B) shows that the language actually states that the funeral home “may continue to operate under that person’s name” for a period of two years. (Emphasis added) see R.C. 4717.11(B), amended by the 132nd General Assembly File No. TBD, HB 49, § 101.01, eff. 9/29/2017.

Plaintiff asserts that Keystone’s employment contract with the plaintiff establishes the commercial value component. In the contract, Keystone agreed to pay plaintiff for the right

“to display and [use] in its advertising and otherwise, the name, likeness and professional license(s) of Employee.” (Exhibit 1, §1-4; Exhibit 3). The contract goes on to state that “[d]uring Employee’s employment with Company, Employee shall be paid an additional fifteen thousand dollars (\$15,000) per year...as consideration for Employee’s grant of such use of his name, likeness and license(s).” Id. Further, pursuant to the contract, Keystone was permitted to use Plaintiff’s persona through December 31, 2014. Id. It is undisputed that the plaintiff did permit the use of his persona for additional two months following the original one-year period provided in the contract. The option to continue to use plaintiff’s name pursuant to 4717.11(B) does not overcome the \$15,000 value that Keystone expressly placed on plaintiff’s name and likeness. Therefore, the Court finds that plaintiff’s persona contains commercial value.

Moreover, Keystone contends that even if the plaintiff’s persona does contain “commercial value,” they have failed to establish that plaintiff’s name was used for a commercial purpose. The statute defines “commercial purpose” as “the use of or reference to an aspect of an individual’s persona in any of the following manners...for advertising or soliciting the purchase of products, merchandise, good, services, or other commercial activities...” see R.C. 2741.01(B). However, the plaintiff provided several formats in which his name was used without his consent: obituaries, directories and phonebooks, funeral home location signage, funeral home websites, website advertising, and employment listings. (4/3/20 Affidavit of Todd Sammons, ¶ 14-26) (Exhibits 6-16).

Keystone asserts that the plaintiff is required to show that some affirmative step was taken to specifically exploit plaintiff’s persona. Further, Keystone argues that the use of plaintiff’s name was inadvertent and therefore not actionable. In the Second District Court of

Appeals case, *James v. Bob Ross Buick, Inc.*, after plaintiff-employee was fired, thirty-three form letters were automatically generated by a software system operated by the defendant and sent to clients without plaintiff's consent. *James v. Bob Ross Buick, Inc.*, 167 Ohio App. 3d 338, 340, 2006-Ohio-2638. An employee of the defendant stated that the generation of letters was unintentional. *Id.* at 341. The Court held that plaintiff's name "clearly had commercial value as personal letters are used to induce future sale to customers who have established a client relationship with the dealership." *Id.* at 343. The Court went on to hold that the inadvertent nature of the way in which the plaintiff's name was used did not "negate the commercial value" of his name. *Id.*

Similar to the facts in *James*, the plaintiff here presented invoices showing agents of Keystone continuing to approve advertisements and signage which included the plaintiff's name even after communication from the plaintiff and letters from his attorney. (Exhibits 2, 4, 5, 6 and 7) Further, Beth Wagner, employee of Keystone, testified in her deposition that she forgot about the one-year consent and thought that she had two years to makes name changes. However, she was still making changes in 2018. (2020 Wagner Deposition, pg. 32).

Finally, defendant contends that many statements contained in plaintiff's affidavit are inadmissible and as a result, the evidence that those statements attempt to authenticate is also inadmissible. The exhibits at issue contain printouts and copies of websites, advertisements, obituaries, directories and phonebook advertisements.

"Authentication of documentary evidence is a condition precedent to admissibility of that matter in evidence." *GMAC v. Bradac*, 8th Dist., Cuyahoga No. 105242, ¶21, 2017-Ohio-7888, citing *Rose v. Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509, 958 N.E.2d 994, ¶27 (2d Dist.), citing Evid. R. 901(A). Evid. R. 901(A) requires authentication by "evidence

sufficient to support a finding that the matter in question is what its proponent claims.” *Id.*, citing Evid. R. 901(B)(1). *Generally*, printouts from the internet are inadmissible hearsay. *Id.*, citing *State v. Kinder*, 6th Dist. Wood No. WD-09-086, 2019-Ohio-5173 (emphasis added).

In support of their argument, the defendant cites Eighth District Court of Appeals case *GMAC v. Bradac*, *supra*. The plaintiff distinguished the *GMAC* and *Ocwen Loan Servicing, LLC v. Graf* decisions by asserting that although the affiant’s exhibits were inadmissible in those cases, neither court held that an affiant could never have personal knowledge of information located on the internet. *Id.*, *Ocwen Loan Servicing, LLC v. Graf*, 2018-Ohio-2411, 2018 Ohio App. LEXIS 2608. Instead, the *Ocwen* court held the inadmissibility was due to the affiant’s failure to provide any information that they had personal knowledge of the facts contained therein and failure to include that the printout contained was a true and accurate copy of the information on the subject website. *Ocwen* at *P37.

Here, the plaintiff’s April 3, 2020 affidavit states, “I am the Plaintiff in the above-captioned lawsuit and have personal knowledge regarding the matters set forth within this Affidavit...The documents attached to this affidavit represent true and accurate copies.” (Plaintiff’s Affidavit, filed 4/3/20). Unlike the affiant in *Ocwen*, the plaintiff’s affidavit includes averments that he “personally viewed” and “personally visited” the listed websites and the dates of viewing. *Id.*, see *Ocwen*. Unlike the affiant in *GMAC*, the web printouts provided by the plaintiff are not electronic copies that exist in physical form. *Id.*, see *GMAC* at *P22.

Further, plaintiff’s internet evidence is not hearsay (i.e. a statement offered in evidence to prove the truth of the matter asserted). That is, the plaintiff is not offering the documents at issue for the truth of the content of the pages. Instead, the purpose is to demonstrate that the

improper use of his persona exists on the internet. Accordingly, the Court finds that plaintiff's affidavit and exhibits attached thereto are properly before the Court.

Plaintiff filed a Motion for Reconsideration of the April 10, 2017 Judgment Entry which limited statutory damages to one award instead of an award for each violation of R.C. 2741.02. (see April 10, 2017 Judgment Entry in *Sammons v. Keystone*, 2015 CV 00881). "Interlocutory orders are subject to motions for reconsideration, whereas judgments and final orders are not." *Pitts v. Ohio Dep't of Transportation* (1981), 67 Ohio St. 2d 378, 379-80 n.1, 423 N.E.2d 1105; see *Jenkins v. Bazzoli* (Franklin 1994), 99 Ohio App. 3d 421, 425 n.2, 650 N.E.2d 966. This is so because "[t]he Ohio Rules of Civil Procedure do not prescribe motions for reconsideration after a final judgment in the trial court." *Pitts*, 67 Ohio St. 2d 378, 423 N.E.2d 1105 (syllabus, para. 1); see *State ex rel. Batten v. Reece* (1962), 70 Ohio St. 2d 246, 248, 436 N.E.2d 1027 (per curiam); *Kemper Securities, Inc. v. Schultz* (Franklin 1996), 111 Ohio App. 3d 621, 625, 676 N.E.2d 1197. Motions for reconsideration filed after the entry of final judgment are thus a "nullity." *Id.* citing *Franks v. The Lima News* (Allen 1996), 109 Ohio App. 3d 408, 411, 672 N.E.2d 245; *Bodo v. Nationwide Ins. Co.* (Trumbull 1991), 75 Ohio App. 3d 499, 504, 599 N.E.2d 844.

Applying the above case law, the April 10, 2017 Judgment Entry is not subject to a motion for reconsideration. Plaintiff argues that the April 10, 2017 Judgment Entry should be reconsidered because the defendant has continued to violate R.C. 2741.02 since the April 10, 2017 Entry. However, the plaintiff has offered no new case law or authority to support this contention. As a result, the Court does not find plaintiff's Motion for Reconsideration to be well taken and denies the same.


Accordingly, the Court finds that plaintiff's motion for partial summary judgment is granted against the defendant, Keystone. Further, the Court finds that plaintiff's persona has commercial value and the defendant used plaintiff's persona for commercial purposes without his consent as it relates to: obituaries, YPM directories and phonebooks, funeral home locations signage, funeral home websites, website advertising, and employment listings. Damages shall be determined at trial.

IV. CONCLUSION

For the reasons set forth above, plaintiff's motion for partial summary judgment is GRANTED. Plaintiff's motion for reconsideration is DENIED.

It is so ORDERED.

The Clerk of Courts is hereby ORDERED to serve a copy of the Judgment Entry upon all parties or counsel.



Thomas M. Marcelain, Judge

Copies to:

Andrea Gebhart, Assignment Commissioner

James P. Tyack, Esq., and Madison Mackay, Esq., Attorneys for Plaintiff
The Tyack Law Firm Co., L.P.A., 536 S. High St., Columbus, OH 43215

Arryn K. Miner, Esq., Attorney for Defendant
Vorys, Sater, Seymour and Pease, LLP, 52 E. Gay St., P.O. Box 1008, Columbus, OH 43215

IN THE COURT OF COMMON PLEAS
LICKING COUNTY, OHIO

2021 MAY -7 PM 1:08

CLERK

Todd A. Sammons,	:	Case No. 2019 CV 00192
	:	
Plaintiff,	:	
	:	
v.	:	Judge Thomas M. Marcelain
	:	
Keystone America, Inc.	:	<u>AGREED TO JUDGMENT ENTRY</u>
	:	
Defendant.	:	

On May 7, 2021, the parties appeared via counsel and agreed to the following Judgment Entry:

BACKGROUND and APPEALABLE ORDERS

On October 16, 2015, Plaintiff filed Case No. 2015 CV 00881.

On October 16, 2018, Plaintiff dismissed Case No. 2015 CV 00881 without prejudice.

On February 15, 2019, Plaintiff filed the above-captioned case raising substantially the same claims as those raised in Case No. 2015 CV 00881.

This Court's rulings on dispositive motions in Case No. 2015 CV 00881 apply in the above-captioned case. The Clerk of Courts is hereby ordered, and the parties hereby agree, to merge the 2015 CV 00881 record and/or file and all pleadings, decisions, discovery, and documents therein to this case record and/or file for purposes of advancing the complete record to the Court of Appeals.

On April 10, 2017, this Court granted Defendant's Motion for Summary Judgment in Case No. 2015 CV 00881 and held that, if the Plaintiff elected statutory damages, his statutory damages, pursuant to R.C. § 2741.07(A)(1)(b), may not exceed \$10,000 in total. Plaintiff intends to appeal the April 10, 2017 decision.

On May 28, 2020, this Court granted Plaintiff's Motion for Summary Judgment in the above-captioned case and denied Plaintiff's motion to reconsider this Court's April 10, 2017 order granting Defendant's Motion for Summary Judgment that capped statutory damages at \$10,000 in total. In granting Plaintiff's Motion for Summary Judgment, this Court held "that plaintiff's persona has commercial value and the defendant used plaintiff's persona for commercial purposes without his consent as it relates to: obituaries, YPM directories and phonebooks, funeral home locations signage, funeral home websites, website advertising, and employment listings." This Court did not determine the number of instances which Defendant used Plaintiff's persona for commercial purposes, deferring that determination to trial. If Plaintiff appeals this Agreed to Judgment Entry, Defendant intends to appeal the May 28, 2020 decision.

On April 8, 2021, in his Response to Defendant Keystone America, Inc.'s Motion for an Order Directing Election of Damages, Plaintiff "inform[ed] the Court and Defendant that he will elect to receive statutory damages in lieu of actual damages pursuant to R.C. 2741.07(A)(1)(b) on his claims against Defendant for the improper use of his persona for commercial purposes under R.C. 2741.02."

On April 30, 2021, this Court denied Defendant's Motion in Limine Prohibiting Plaintiff from Seeking Punitive Damages at Trial and held as a matter of law that, "[w]hile those punitive damages are capped, as would actual damages act as a cap on punitive damages, punitive damages by themselves are not precluded by electing statutory damages." If Plaintiff appeals this Agreed to Judgment Entry, Defendant intends to appeal the April 30, 2021 decision.

STIPULATIONS

Defendant stipulates that it used Plaintiff's name in violation of R.C. § 2741.02(A)(1) two times. Specifically, Defendant stipulates that it used Plaintiff's name on its business signage at its 289 South Main Street, Pataskala, Ohio location for a short period of time after February 28, 2015 without Plaintiff's consent. Likewise, Defendant also stipulates that it used Plaintiff's name on its business signage at its 225 North Main Street, Johnstown, Ohio location for a short period of time after February 28, 2015 without Plaintiff's consent.

Defendant stipulates to the entry of a \$10,000 judgment for the two stipulated instances, in accordance with this Court's April 10, 2017 Order capping total statutory damages at \$10,000 in total. Defendant's stipulation is without prejudice to it defending any other alleged instances of the use of Plaintiff's persona in violation of R.C. § 2741.02. Defendant's stipulation is also without prejudice to leaving to the finder of fact the determination of the proper amount of statutory damages that may be awarded if the Court of Appeals orders remand.

Plaintiff maintains that Defendant used his name in violation of R.C. § 2741.02 more than the two occasions described above and that the precise number of violations must be determined by the trier of fact if the Court of Appeals orders remand.

Plaintiff's stipulation is without prejudice to him prosecuting or maintaining claims of any other additional alleged instances of the use of Plaintiff's persona in violation of R.C. § 2741.02 if the Court of Appeals orders remand. Plaintiff's stipulation is also without prejudice to leaving to the finder of fact the determination of the proper amount of statutory damages that may be awarded for any and all other alleged instances of the use of Plaintiff's persona in violation of R.C. § 2741.02 if the Court of Appeals orders remand. The Parties agree that, in the case of such a remand, should Plaintiff maintain claims of any other additional alleged instances

of the use of Plaintiff's persona in violation of R.C. § 2741.02 that have not already been disclosed to Defendant as of April 30, 2021, discovery into those alleged instances is proper.

Plaintiff waives any claim to punitive damages for the two stipulated instances described above. Plaintiff's stipulation is without prejudice to seeking, and he does not waive his ability to seek, punitive damages for any other alleged instances of the use of his persona in violation of R.C. § 2741.02 that he may seek to raise to the finder of fact if the Court of Appeals orders remand.

Plaintiff stipulates to the dismissal of his second cause of action with prejudice.

The Parties stipulate and the Court agrees that this Agreed to Judgment Entry and the stipulations contained herein cannot be used in any subsequent trial proceedings. For avoidance of doubt, this stipulation and agreement does not prevent any party, or this Court on its own motion, from seeking to enforce the terms of this Agreed to Judgment Entry.

The Parties stipulate and the Court agrees that the parties expressly reserve the right to appeal from this Agreed to Judgment Entry and any interlocutory orders merged into this Agreed to Judgment Entry.


The Parties stipulate and this Court agrees that upon final appellate determination, Plaintiff may file a fee and expense petition pursuant to R.C. 2741.07(D)(1). This stipulation is without prejudice to Defendant's ability to defend and oppose any such fee petition and is not an acknowledgement or agreement that this Court should exercise its discretion to grant any fees or expenses.

ORDER

Accordingly, this Court enters judgment in favor of Plaintiff and against Defendant in the amount of \$10,000.

Pursuant to Civ.R. 54(B), this Court determines that there is no just reason for delay and that appeal is proper.

It is so ORDERED.



Thomas M. Marcelain, Judge