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HAMILTON COUNTY, OH



Charles A. Brigham, III 0030239
Trial Attorney for Plaintiffs

2009 APR -3 A 10: 56

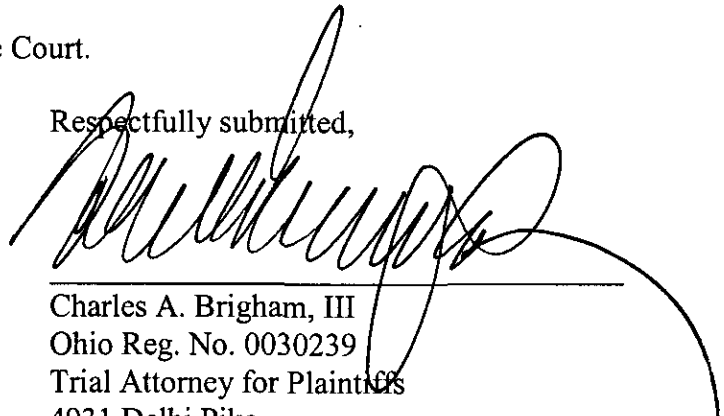
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

FILED

LAURA BRAUN, et al.	:	Case No. A0803137
	:	
PLAINTIFFS	:	Judge Winkler
	:	
vs.	:	
	:	
KEVIN RHODES,	:	MEMORANDUM IN
	:	OPPOSITION TO
DEFENDANT	:	DEFENDANT'S MOTION
	:	<u>FOR SUMMARY JUDGMENT</u>
	:	
	:	(ORAL ARGUMENT REQUESTED)
	:	

Now come Plaintiffs, Laura Braun and Jeffrey Braun, by and through their undersigned counsel, and respectfully request that the Court deny Defendant's Motion for Summary Judgment *because stealing someone's identity and sending out a mass email describing private sexual activity about them for the purpose of cruelty and harassment is actionable under Ohio law*. A Memorandum in support follows. Plaintiffs additionally respectfully request that this matter be scheduled for oral argument before the Court.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS:

Jeff and Laura Braun live in the quiet western community of Delhi Township. Jeff serves his community as a police officer and Laura is a teacher. They are raising two small children and have close family connections. They are not public officials and they are not public figures. The Brauns enjoy a peaceful and private life together.

That privacy was interrupted during the early days of 2008 when Defendant sent an email to numerous known and unknown recipients.¹ That email contained cruel and untrue statements written with a malicious intent and for no lawful purpose. The publisher of the email assumed the identity of Jeffrey and Laura Braun and impersonated them so as to cause the recipients to believe that the Brauns had written the email and to further embarrass and humiliate the Plaintiffs.

The email described a fictitious event involving a trip to the Braun children's grandparents where they were allowed to partake in watching the family dogs having sexual intercourse. It made references to Plaintiff's father as "Boss Hogg" and mocked their religious beliefs and simple lifestyle.

It didn't end there. The Defendant continued his assault by describing what he imagined were details of their intimate sexual relationship and described precisely how this husband and wife engaged in sexual activity later that that evening.

The email served no lawful purpose. Rather, as indicated plainly by the language of its text, its purpose was solely to humiliate, embarrass and harass the Brauns.

¹ A photocopy of the text of the email is attached hereto.

A criminal investigation was initiated. The investigating officer, Detective William Roberts of the Delhi Police Department, issued an official police report indicating that the email originated from an IP address of 74.215.46.133.² Because the email was published to third persons and not to the Brauns directly, the Delhi Police concluded that the specific crime of telecommunications harassment should not be further investigated.

An action for discovery under the Ohio Civil Rules was thereafter filed in the Court of Common Pleas of Hamilton County, Ohio, and assigned Case No. A0800419. After hearing before Judge Robert Ruehlman, a subpoena was issued to Cincinnati Bell to compel disclosure of the person assigned the IP address of 74.215.46.133.³

That IP, Cincinnati Bell reported, belongs to Defendant Kevin Rhodes.

II. ARGUMENT OF LAW:

A. **Standard of Review for Summary Judgment**

The request for summary judgment is extraordinary under our common notions of justice because it deprives a litigant of the opportunity to redress grievances and would place judgment, in summary form, to the moving party. It is fundamental law in Ohio, therefore, that a tremendous burden falls upon the moving party in order to prevail by use of such a summary remedy.

Summary judgment is only proper when it appears from the evidence that reasonable minds can come to *but one conclusion* and that conclusion is adverse to the party against whom the motion for summary judgment is made. Ohio Civil Rule 56(C).

² A photocopy of the narrative supplement of the police report is attached hereto.

³ A photocopy of the subpoena return is attached hereto.

More, few standards for review are more widely known or enjoy more immediate recognition than the mandate declared by Ohio law that motions for summary judgment should be denied when the court finds a genuine issue of material fact or when reasonable minds could come to differing conclusions regarding the legal appropriateness of a movant's summary judgment request. Temple v. Wean United, Inc., 50 Ohio St.2d 317, 363 N.E.2d 267 (1977). It is a procedural remedy designed to terminate litigation and it must be awarded with caution, resolving any doubt to the favor of the nonmoving party. Norris v. Ohio Standard Oil Co., 70 Ohio St.2d 1 (1982).

The burden to support such an extraordinary summary remedy falls upon the moving party. Harless v. Willis Day Warehousing Co. 54 Ohio St.2d 64, 375 N.E.2d 46 (1978). All evidence presented in support of a motion for summary judgment should rightly be construed most strongly in favor of the party against whom the motion is made. Morris v. First National Bank & Trust Co. of Ravenna, 21 Ohio St.2d 25, 254 N.E.2d 683 (1970).

The evidence presented in this case, *when viewed in a light most favorable to the Plaintiffs*, demonstrates that Defendant intentionally committed acts which support and will ultimately prove causes of action for defamation, invasion or privacy, identify theft and intentional infliction of emotional distress.

B. Ohio Law Supports the Claims Against Defendant

Defendant Kevin Rhodes was caught red-handed. Lurking in hoped for anonymity, he used an email sender address that did not immediately disclose his identity. But an unavoidable consequence to using the Internet is found in an IP address which, as reported by Cincinnati Bell, belonged to a fuse.net account held in the name of Defendant. Like a fingerprint, the IP address is used to singularly identify an account from which material is splayed onto the public realm. It

works in the same fashion as caller-ID and enjoys the same technical reliability so as to move a person from initial anonymity to a specific perpetrator.

As could be predicted, Defendant denies sending the email. Defendant, however, is unable to provide any explanation as to how his Internet account may have been accessed by others and has specifically denied any knowledge of others having access to his email accounts. (Defendant Rhodes Deposition, pp. 56,57; 62-64).

1. The Email Was False, Tortuous and Defamatory

In Ohio, defamation is defined as a false statement published by a defendant acting with the required degree of fault and that injures someone's reputation or exposes him or her to public ridicule or contempt or shame or disgrace. A & B-Abell Elevator Co., Inc., v Columbus/Central Ohio Bldg. & Construction Trade Council, 73 Ohio St.3d 1, 651 N.E.2d 1283 (1995). Certainly, the email was false. The Brauns did not actually take their two young children to their grandparents' house and expose them to witnessing dogs engaged in copulation.

Nor did they practice the sharing of close intimacies enjoyed by married partners to the Internet public. Their father and father-in-law is not "Boss Hogg" as that infamous character of dishonesty and corruption is widely known to the general public from a former television series.

They do not ridicule Jesus.

Defendant, in his Motion for Summary Judgment, argues that the communication is nothing more than parody and is, therefore, not actionable. As stated in the most recent edition of Merriam-Webster, a parody includes a style of work in which the author imitates for the purpose of ridicule. This common usage definition of *parody* includes the very essence of an

element of defamation; namely, a publication that exposes a person to ridicule. Sweitzer v. Outlet Communications, Inc., 133 Ohio App.3d 102 (Ohio Ct. App., Franklin County, 1999).

Mr. and Mrs. Braun are not public officials or public figures and they should not be subjected to the taunt and ridicule given them by Defendant by his use of false, malicious and disgusting innuendos (see for example Hustler Magazine v. Falwell, 485 U.S. 46, 99 L.Ed.2d 41 (1988)).

They are entitled to enjoy their lives as private citizens. Although Mr. Braun is employed as a police officer for Delhi Township, Defendant's publication was in no way directed to any legitimate comment upon matters pertaining to his public or official duties. Rather, it was a cruel spear thrust into the most private and personal part of their lives. The email was as an intentional use of defamatory and untrue statements carefully calculated to mock them in the public realm by the use of false and untrue statements.

Sending Christmas newsletters to friends and family is a beautiful and honored tradition in our culture and in our communities. Although Defendant incredibly maintains that he has never seen such a Christmas end-of-year letter (Rhodes Deposition p. 49), he believed it to be an embarrassing gesture (Rhodes Deposition p. 48). Reading the Rhodes deposition, an almost "they got what they deserved" mentality springs forth. The holiday tradition of sharing information about your children's progress in school and about their activities and about life's events does not and should not invite Defendant to trespass upon this family and to expose them to the ridicule, shame or disgrace Defendant felt they deserved.

2. The Email Unlawfully Invaded Plaintiffs' Privacy and Unlawfully Impersonated Them

Ohio has long recognized and protected the right of privacy. In acknowledging that the right is derived from natural law and well settled in the common law, the Ohio Supreme Court long ago recognized three types of invasion of privacy claims. As stated in Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956), the right of privacy generally is the right of a person to be let alone and further declared specifically that an *actionable* invasion of the right of privacy is:

- a. the unwarranted appropriation or exploitation of one's personality;
- b. the publicizing of one's private affairs with which the public has no legitimate concern; or
- c. the wrongful intrusion into one's private activities in such a matter as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Defendant hit all three.

The conduct by Defendant involved the unwarranted appropriation and sadistic exploitation of the personality and persons belonging to the Brauns (in today's terms by "identity theft"). Defendant did this in two ways. First, directly, by actually signing the bottom of his email, "Happy New Year, Laura & Jeff Braun." Moreover and pervasively, Rhodes appropriated their relationship and lifestyle throughout the words of his publication and turned an innocent visit to the grandparents into an opportunity to mock their religion, their family, and their relationship.

The matters of children, family, lifestyle, religion, and intimate relations between a husband and wife are deeply private and personal. Even presenting these matters in plain truth and with accurate detail would be a violation of privacy because the public has no legitimate concern over these affairs.

Defendant's intrusion into the private affairs of the Braun family was wrongful at its core. Rhodes' liability to the Brauns is further supported by the nature and manner of his tort. Not only did Rhodes expose private matters, he did so in a manner appealing to prurient interest with a visible aim toward humiliation, shame and embarrassment.

The holding and syllabus in Housh has been cited frequently as the seminal case in Ohio law recognizing the right of recovery for those inflicted by this tortuous conduct. See, for example, Killilea v. Sears, Roebuck & Co., 27 Ohio App.3d 163, 499 N.E.2d 1291 (Franklin County 1985) and Hall v. CFIC Home Mtg., 175 Ohio App. 3d 587 (Butler County, 2008).

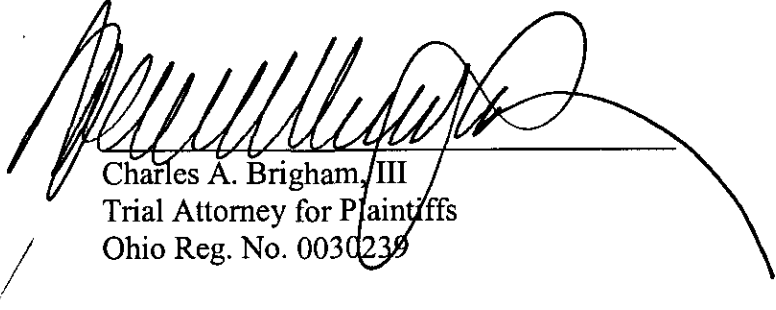
Clearly, the activities of Defendant Rhodes are actionable under Ohio law.

III. CONCLUSION:

A written communication that contains false, tortuous and defamatory content, that is intended to be harmful, abusive, harassing, obscene and vulgar, that cuts through and rips away the privacy belonging to citizens of this State without lawful purpose or legitimate origin, and further degrades and humiliates by impersonation and stolen identity enjoys no protection under Ohio law.

Mr. and Mrs. Braun respectfully request that this Court grant them their day in court and allow them to fully present the case establishing their facts and seeking their remedies. Because the actions of Defendant were malicious and egregious, Defendant ought to be subject to answer for damages in a punitive nature. Certainly, an order of this Court permanently enjoining Defendant from continuing any conduct of this nature would be appropriate.

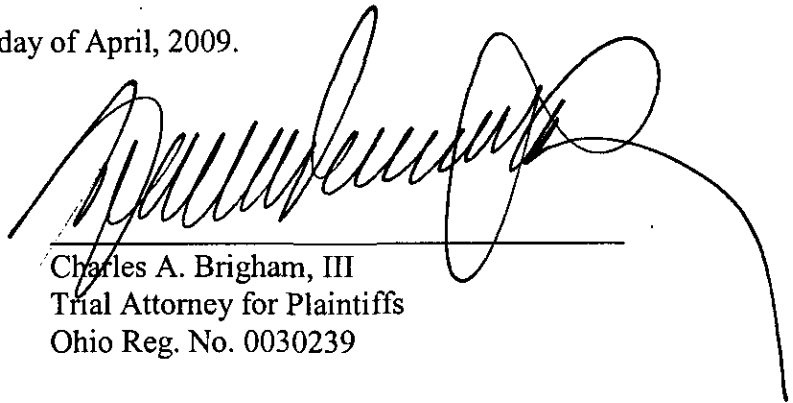
Accordingly, Plaintiffs ask that Defendant's Motion for Summary Judgment be denied.



Charles A. Brigham, III
Trial Attorney for Plaintiffs
Ohio Reg. No. 0030239

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Defendant's Motion for Summary Judgment was served upon Bernard W. Wharton, Trial Attorney for Defendant, Suite 900 Provident Bank Building, 632 Vine Street, Cincinnati, OH 45202-2442 by ordinary US Mail service this 31st day of April, 2009.



Charles A. Brigham, III
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NARRATIVE SUPPLEMENT		INCIDENT NUMBER 72362
VICTIM Braun, Laura	OFFENSE Telecomm. Harassment	INCIDENT DATE & TIME 1-7-08/1940

1-9-08/1612

After reading the report and looking at the section in the O.R.C. I believe that Laura Braun is not a victim of telecommunications harassment as a result of this email. She was not a direct recipient and it is an obvious parody. I did look at the header information and the email originated from I.P. address 74.215.46.133 on 1-5-08 at 2008EST. This I.P. address belongs to Fuse (Cincinnati Bell). It emanated locally but without a court order I can not identify the sender. This information was passed onto JSB.

Request this case be closed as unfounded.

Det. Roberts WS

CINCINNATI BELL SECURITY

221 E. 4th Street 103-720
Cincinnati, OH 45202
Phone: 513-397-6800
Fax: 513-381-5352

To: Charles Brigham, III

From: Jennie

Comments:

Attached please find information regarding IP 74.215.46.133.

Feel free to call if you have any questions regarding these records.

Date: 1-16-08

Total Pages Including This Page: 12

THIS FACSIMILE TRANSMISSION IS INTENDED ONLY FOR THE ADDRESSEE NAMED ABOVE. IT CONTAINS INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL OR OTHERWISE PROTECTED FROM USE OR DISCLOSURE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY REVIEW, DISCLOSURE, COPYING, OR DISSEMINATION OF THIS TRANSMISSION, OR ANY ACTION IN RELIANCE ON ITS CONTENTS, OR OTHER USE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TRANSMISSION IN ERROR, PLEASE NOTIFY US BY TELEPHONE IMMEDIATELY SO THAT WE CAN ARRANGE FOR ITS RETURN TO US. THANK YOU FOR YOUR COOPERATION.

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Customer information for that date/time are :

Kevin Rhodes
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513-451-5154 -073

active email addresses :

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ZoomTown service has been active since 6-8-2007

1/15/2008

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