

No. 1-12-1491

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN DOE,)	Appeal from the
Plaintiff-Appellant and Cross-)	Circuit Court of
Appellee,)	Cook County.
)	
v.)	No. 06 L 5694
)	
FLAVA WORKS, INC., LUKEBABY)	Honorable
PRODUCTION, INC., COCODORM.COM, INC.,)	Barbara A. McDonald,
and PHILLIP BLEICHER,)	Judge Presiding.
Defendants-Appellees and Cross-)	
Appellants.)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 HELD: The court did not err by limiting plaintiff's recovery under the Right of Publicity Act to \$1,000 because plaintiff did not establish that any profits earned from the sale of the DVDs at issue were derived from the unauthorized use of his image. The court did not abuse its discretion by deciding not to award attorney fees because it is not clear that doing so would have promoted the objectives of the Right of Publicity Act or the fee provision set forth therein, as plaintiff had a financial incentive to pursue his claim independent of the fee provision and plaintiff only achieved *de minimis* success on his claim. Defendants waived their motion for a directed finding by presenting evidence in support of their defense after having received an adverse ruling on the motion.

¶ 2 Plaintiff, John Doe, appeals and defendants, Flava Works, Inc., Lukebaby Production,

Inc., Cocodorm.com, Inc., and Phillip Bleicher, cross-appeal from an order of the circuit court of Cook County entering judgment in favor of plaintiff on his claims under the Right of Publicity Act (Act) (765 ILCS 1075/1 *et seq.* (West 2004)) and for public disclosure of a private fact and awarding plaintiff \$1,000 in damages. On appeal, plaintiff contends that the court erred by limiting the damages award on his statutory claim to \$1,000 and failing to award him attorney fees. On cross-appeal, defendants contend that the court erred by denying their motion for a directed finding at the close of plaintiff's case. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On February 22, 2007, plaintiff filed an amended complaint against defendants in which plaintiff asserted that he was a video camera operator, videographer, and video editor and that defendants, which engaged in the business of producing, filming, editing, and distributing live action visual media containing explicit sexual content, hired him to film and direct portions of two adult DVDs that were released and distributed in or about June 2005. Plaintiff also asserted that although he never agreed to appear in either DVD and never gave defendants his permission to use his likeness or voice in either DVD, both DVDs contained footage of his face, body, and voice while acting in the capacity of a camera operator and director. Plaintiff further asserted that he did not receive any compensation for his appearances in the DVDs, defendants earned substantial profits from the sale and distribution of the DVDs, and his appearances increased the value of the DVDs and contributed to defendants' profits.

¶ 5 Plaintiff alleged that defendants violated the Act by releasing and distributing the DVDs, which contained his likeness and voice, for commercial purposes and without his consent. In his claim for public disclosure of a private fact, plaintiff alleged that his employment in the adult film industry was a private fact that was not publicly known, his occupation would be offensive

to a reasonable person and is embarrassing to him, defendants publicly disclosed that fact when they released the DVDs containing footage of his likeness and voice, and he sustained personal and pecuniary damages as a result of the public disclosure of that private fact. In each count, plaintiff requested compensatory and punitive damages in excess of \$50,000, plus costs and attorney fees.

¶ 6 Following a bench trial, the circuit court found that defendants violated the Act by using plaintiff's identity for a commercial purpose because plaintiff's image could be identified during two parts of the DVDs and the DVDs were sold to the public and stated that the issue of whether plaintiff's image was identifiable was "a close question." Regarding damages, the court stated that plaintiff did not ask for actual damages, and only sought the profits derived from the sale of the DVDs. The court found that plaintiff was not entitled to the profits from the DVDs because the Act only provides for the recovery of profits derived from the unauthorized use of plaintiff's identity and plaintiff did not prove that his image added value to the DVDs or that any profits were derived from the unauthorized use of his identity. The court concluded that plaintiff was only entitled to the statutory penalty of \$1,000 and was not entitled to attorney fees because "one would be hard-pressed to say the Plaintiff prevailed by getting a thousand dollars" and, "in any event, it's in my discretion to award them, and I'm not going to." The court also found that plaintiff established his claim for public disclosure of a private fact, but concluded that he was only entitled to nominal damages because he did not prove actual damages and that the \$1,000 award on the statutory claim was sufficient to cover those nominal damages.

¶ 7 ANALYSIS

¶ 8 I. Damages

¶ 9 The Act provides that an entity "may not use an individual's identity for commercial

purposes during the individual's lifetime without having obtained previous written consent from the appropriate person." 765 ILCS 1075/30(a) (West 2004). An entity which violates the Act is liable for actual damages and/or "profits derived from the unauthorized use" or, if that amount is below \$1,000, a statutory penalty of \$1,000. 765 ILCS 1075/40(a) (West 2004).

¶ 10 Plaintiff contends that the court misinterpreted the Act when it decided that he was not entitled to receive the profits derived from the DVDs and only awarded him \$1,000 in damages. Issues of statutory construction present questions of law, and a circuit court's decision as to the proper construction of a statute is reviewed *de novo*. *Solon v. Midwest Medical Records Ass'n, Inc.*, 236 Ill. 2d 433, 439 (2010). The primary objective in construing a statute is to ascertain and give effect to the intent of the legislature, and the best indication of legislative intent is the plain meaning of the statutory language. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 11. When a statute's language is clear and unambiguous, the statute must be given its plain and ordinary meaning without resort to further aids of statutory construction. *Alvarez v. Pappas*, 229 Ill. 2d 217, 228 (2008).

¶ 11 The Act provides that an entity which improperly uses a person's identity for commercial purposes may be liable for "profits derived from the unauthorized use." 765 ILCS 1075/40(a) (West 2004). Thus, under the plain language of the Act, a plaintiff is only entitled to profits derived from the unauthorized use itself, and not profits derived from a product in which the unauthorized use is found. As such, plaintiff was required to establish a connection between the DVD profits and the improper use of his identity and show that the DVD profits were directly attributable to the unauthorized use of his image. *Trannel v. Prairie Ridge Media, Inc.*, 2013 IL App (2d) 120725, ¶ 31. The court correctly applied that requirement to plaintiff when it found that plaintiff had not proved that any of the DVD profits were derived from the unauthorized use

of his image because his limited appearances in the DVDs did not add to their value.

¶ 12 Accordingly, we conclude that the court did not err when it decided that plaintiff was not entitled to the profits from the DVDs and limited his recovery under the Act to \$1,000. To the extent plaintiff is concerned that such a holding will allow for the use of any person's identity for commercial purposes without penalty, we note that the Act provides for a penalty of \$1,000 in the absence of actual damages or profits derived from the unauthorized use. In addition, while plaintiff asserts that the court's decision is against the manifest weight of the evidence because he proved that defendants earned \$70,200 in profits from the sale of the DVDs, such evidence is not relevant to the issue of whether any of those profits were derived from the unauthorized use.

¶ 13 II. Attorney Fees

¶ 14 Plaintiff also contends that the court erred by failing to award him attorney fees pursuant to the Act. Under the Act, a court "may award to the prevailing party reasonable attorney's fees, costs, and expenses." 765 ILCS 1075/55 (West 2004). As the use of the word "may" implies that the legislature intended to grant the court discretion in deciding whether to award attorney fees (*Krautsack v. Anderson*, 223 Ill. 2d 541, 554 (2006)) and a court's decision as to attorney fees generally will not be reversed absent an abuse of discretion (*Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 225 (2007)), we will review the court's decision not to award attorney fees in this case under an abuse of discretion standard. A court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt its view. *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 27.

¶ 15 Plaintiff asserts that he is entitled to attorney fees because he was the prevailing party with regard to his claim brought under the Act. In delivering its judgment, the court stated that "one would be hard-pressed to say the Plaintiff prevailed by getting a thousand dollars. But also

the Defendant didn't prevail. So I don't really view either party as a prevailing party. And in any event, it's in my discretion to award them, and I'm not going to."

¶ 16 A party can be considered the prevailing party for the purpose of awarding attorney fees when that party is successful on any significant issue in the action and achieves some benefit from bringing the suit by receiving a favorable judgment or obtaining an affirmative recovery. *Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1021 (2000). As plaintiff received a judgment in his favor on his claim that defendants violated the Act by using his identity for a commercial purpose and obtained a recovery of \$1,000 on the basis of that judgment, we determine that plaintiff was the prevailing party in this case.

¶ 17 However, the court was not required to award plaintiff attorney fees just because he was the prevailing party, as the Act provides that a court "may" award attorney fees to the prevailing party. 765 ILCS 1075/55 (West 2004). In addition, the court in this case did not entirely base its decision not to award attorney fees upon its finding that plaintiff was not a prevailing party, as it stated after making that finding that "in any event, it's in my discretion to award [attorney fees], and I'm not going to." As such, our determination that plaintiff was the prevailing party does not resolve the issue of whether he was entitled to attorney fees, and we now consider whether the court's decision not to award attorney fees constitutes an abuse of its discretion.

¶ 18 A court should award attorney fees pursuant to a statutory fee provision if doing so will promote the objectives of the statute and the fee provision. *Callinan v. Prisoner Review Board*, 371 Ill. App. 3d 272, 276 (2007). The Act protects a person's right to control the use of his or her identity for commercial purposes (765 ILCS 1075/10 (West 2004)) by providing that his or her identity may not be used for commercial purposes without that person's written consent (765 ILCS 1075/30(a) (West 2004)) and compensates a victim by providing for actual damages while

ensuring that an entity will not profit from violating a person's right of publicity by holding that entity liable for profits derived from the unauthorized use (765 ILCS 1075/40(a) (West 2004)). The Act also provides that punitive damages may be awarded against an entity which willfully violates a person's right of publicity (765 ILCS 1075/40(b) (West 2004)) and provides the court with discretion to award attorney fees to the prevailing party on a claim brought under the Act (765 ILCS 1075/55 (West 2004)). Thus, the Act ensures that a victim will be compensated for injuries caused by the violation of his or her right of publicity and that a violator will not profit from its misconduct and punishes a violator who willfully violates the Act. The Act also dissuades violations by imposing a \$1,000 penalty in the absence of actual damages or profits derived from the unauthorized use and giving the court the discretion to award a victim attorney fees incurred in pursuing his or her claim under the Act. In addition, as plaintiff points out in his brief, many fee provisions help potential litigants obtain legal assistance by creating financial incentives for lawyers to assume their representation. *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 686 (2003); *Duncan Publishing Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 786 (1999); *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 236 (1996); *City of Chicago v. Illinois Commerce Comm'n*, 187 Ill. App. 3d 468, 470 (1989).

¶ 19 In this case, it is unclear that an award of attorney fees would promote the objectives of the Act or the fee provision contained therein. A successful litigant may obtain compensatory and punitive damages under the Act. Here, plaintiff sought approximately \$70,000 in damages for the profits made from the DVD sales and was seeking punitive damages as well. Although plaintiff was not successful in obtaining those damages, the availability of those damages provided plaintiff and his attorneys with a financial incentive to pursue the claim independent of a possible attorney fees award.

¶ 20 In addition, defendants, citing the United States Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), assert that plaintiff was not entitled to attorney fees because he only achieved *de minimis* success. In *Farrar*, the court held, in the context of the fee provision in the Civil Rights Act, that the degree of a plaintiff's overall success on a claim is "the most critical factor" in determining the reasonableness of a fee award and that a court may deny fees to a plaintiff who has only achieved *de minimis* success. *Id.* at 114-15.

¶ 21 While plaintiff is technically the prevailing party in this case, he has only achieved *de minimis* success. Plaintiff has not proved that he suffered any actual damages from the use of his identity or that defendants derived any profits from the unauthorized use. The \$1,000 award he obtained is the minimum award allowable under the Act, which is far less than the \$70,000 he was seeking. Furthermore, the court found that plaintiff made the minimum showing necessary to establish a violation of the Act when it stated that the issue of whether plaintiff's image was identifiable presented "a close question." As plaintiff obtained the minimum award allowable under the Act and made the minimum showing necessary to establish a violation of the Act, the court's decision not to award attorney fees is not arbitrary, fanciful, or unreasonable.

¶ 22 Plaintiff maintains that he achieved more than *de minimis* success because, unlike the plaintiff in *Farrar* who only obtained nominal damages, in this case plaintiff received a \$1,000 award. As previously stated, the statutory award of \$1,000 is equivalent to an award of nominal damages for the purpose of gauging a claim's success because the \$1,000 plaintiff received is the minimum allowable award under the Act. Also, we have considered *Shepard v. Hanley*, 274 Ill. App. 3d 442 (1995), and find it distinguishable. In *Shepard*, 274 Ill. App. 3d at 445, this court held that the circuit court did not abuse its discretion by awarding the plaintiffs a portion of the attorney fees they incurred in pursuing their claims under the Civil Rights Act even though they

only received nominal damages. However, the plaintiffs established that the defendants had violated their constitutional right to be free from unreasonable searches and seizures and the court found the enforcement of that right to be essential to the preservation of our system of government. *Id.* Because the plaintiffs prevailed on a significant legal issue and the litigation served an important public purpose, the court awarded plaintiff a portion of their attorney fees. *Id.* In this case, we are required to defer to the court's decision not to award attorney fees unless it constitutes an abuse of discretion, the legal issue regarding plaintiff's right of publicity is not as significant as an issue concerning the constitutional right to be free from unreasonable searches and seizures, and the litigation does not serve as important of a public purpose. As such, we conclude that the court did not abuse its discretion by deciding not to grant plaintiff an award of attorney fees on his claim brought under the Act.

¶ 23 III. Motion for Directed Finding

¶ 24 Defendants contend that the court erred by denying their motion for a directed finding. At the close of plaintiff's case, defendants filed a motion pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110) (West 2010)), requesting a finding in their favor on plaintiff's claims. The court denied defendants' motion as to the claim brought under the Act and took the motion under advisement as to the common law claim for public disclosure of a private fact. Defendants then proceeded to produce evidence in support of their defense to plaintiff's claims.

¶ 25 At the close of the plaintiff's evidence in a non-jury case, a defendant may move for a finding or judgment in its favor and, if the ruling on the motion is adverse to the defendant, "the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived." 735 ILCS 5/2-1110 (West 2010). As defendants presented evidence in their

defense after having received an adverse ruling on their motion for a directed finding, defendants have waived that motion and may not now challenge the circuit court's ruling on appeal. *Pancoe v. Singh*, 376 Ill. App. 3d 900, 909 (2007).

¶ 26

CONCLUSION

¶ 27 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.