

No. 1-10-3726

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

DEBORAH ABBS, as mother and next friend of)	Appeal from the
BRANDON ABBS, a minor,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	No. 07 CH 34634
v.)	
)	Honorable
LILY'S TALENT AGENCY, INC., NOBLE &)	Kathleen Pantle,
ASSOCIATES, and GERBER PRODUCTS)	Judge Presiding.
COMPANY,)	
)	
Defendants-Appellees.)	

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in granting a talent agency's motion for summary judgment because it did not use a child model's likeness for a commercial purpose in violation of the Illinois Right of Publicity Act, 765 ILCS 1075/30(a) (West 2010).

¶ 2 Plaintiff Deborah Abbs, on behalf of her minor son Brandon Abbs, appeals the circuit

court's granting of summary judgment in favor of defendant Lily's Talent Agency, Inc.¹ Abbs claims that there is a genuine issue of material fact about whether Lily's violated the Illinois Right to Publicity Act, 765 ILCS 1075/30(a) (West 2010), because Lily's authorized a manufacturer to use Brandon's likeness to promote and sell its products without her consent. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 BACKGROUND

¶ 4 Brandon Abbs was born on October 5, 1999, and his mother and guardian is Deborah Abbs. Brandon participated in a photo shoot on November 6, 2000, arranged by Noble & Associates, an advertising agency and Gerber Products Company's representative. Gerber is a product company that manufactures, packages and distributes consumer products, which include baby food, children's cereal and other child and baby products. Gerber uses photographs obtained through Noble for its marketing, advertising and promotion of goods it sells in the consumer market.

¶ 5 Lily's Talent Agency is a talent and modeling agency that provides modeling services for advertising agencies seeking photographs for use on products and goods. Lily's obtains engagements for its clients with various media and advertising agencies. Lily's does not decide the end use of photographs taken at a photo shoot with its client and it does not sell any products to the public using photographs taken during a photo shoot.

¹ Abbs's notice of appeal and opening brief include claims against listed defendants Noble & Associates and Gerber Products Company. However, these defendants and Abbs reached a settlement and the appeal against those defendants was dismissed.

¶ 6 In November 2000, Abbs hired Lily's as Brandon's agent to obtain and market photographs of him. By acting as Brandon's agent, Lily's would be paid 20% of any amount that Brandon earned as a result of Lily's procuring talent or modeling work on his behalf. On December 6, 2000, Brandon participated in a photo shoot arranged by Lily's, and the photographs would potentially be used by Gerber, Noble's client. This photo shoot lasted approximately three hours. Brandon received \$65 per hour as compensation for the photo shoot, plus an additional hour for travel time. Brandon would receive a \$300 bonus, plus 20% commission for his agent, if his photographs were used in final print work.

¶ 7 At the photo shoot, Abbs signed a "Model's Release" prepared on Noble's stationary, which granted Noble and Gerber unlimited use of the photographs for advertising, promotion, trade or any other similar lawful use. The release also waived Abbs's right to inspect or approve the finished product or advertising copy using the photographs. Lily's Talent was printed in the space provided for identifying the model's agency on the release.

¶ 8 Abbs signed a second "Model's Release" at the photo shoot, which was generated in a voucher format by Lily's. Brandon was listed as the model and Gerber was listed as the client on the voucher. This release also granted Gerber the right and permission to "copyright, use or publish photographs for art, advertising, trade or any other similar lawful purpose whatsoever." Similar to the other release, Abbs again waived her right to inspect or approve of the finished product or advertising copy.

1-10-3726

¶ 9 After the December 2000 photo shoot, Noble and Gerber selected for use photographs of Brandon. Noble compensated Lily's for Brandon's four hours of work and the \$300 bonus since his photographs were selected by Gerber to use in its final work product. Lily's remitted the amount owed from the photo shoot to Abbs, who accepted the amount.

¶ 10 In late 2002, Abbs learned that Gerber used Brandon's identity and likeness on various printed advertising brochures. In late 2004, Abbs also learned that Gerber used Brandon's identity and likeness on its packaging for baby products because she saw his image on Gerber packaging at a local Target store. Abbs contacted Lily's regarding the use of Brandon's identity and likeness by Gerber, but Lily's indicated that it lost all documentation regarding its dealings with Abbs and Gerber or Gerber's advertising agency.

¶ 11 From 2003 to 2004, Abbs earned additional bonuses and usage fees for the extended use of Brandon's photograph on Gerber products. In January 2004, Lily's remitted payment to Abbs in the amount of \$240, but the payment was returned to Lily's because Abbs was not residing at the address previously provided to Lily's. In February 2005, Lily's and Noble agreed to extend the continued use of Brandon's photograph on the back of a cereal box from January 2005 through December 2006. In approximately late March or early April 2005, Lily's again attempted to contact Abbs to remit payment for the two year extended use of Brandon's photograph, but the attempt was unsuccessful because Abbs no longer resided at the address on file. Abbs had no knowledge nor did she directly authorize the extended use of Brandon's photograph by Gerber after January 2004.

¶ 12 Abbs contacted Lily's in November 2004 because she had not been paid for the use of Brandon's photograph. Lily's replied that it had no documentation concerning Brandon and Gerber, and that his file was lost. Abbs informed Lily's that she would be contacting Gerber directly. Through her attorney, Abbs contacted Gerber in the Spring of 2005 regarding the use of Brandon's photograph. In response to Gerber's request, Abbs sent Gerber an email on April 29, 2005, detailing its use of Brandon's photograph on cereal boxes and in coupon books. Abbs listed eight separate uses with copyrights from 2002 through 2004. Abbs also informed Gerber in the email that Brandon has not received compensation for the use of the photograph. Abbs received no reply from Gerber regarding the email.

¶ 13 On July 28, 2006, Abbs filed a complaint in the circuit court of DuPage county against Lily's. Lily's filed a motion to transfer venue from the circuit court of DuPage county to the circuit court of Cook county on February 2, 2007. On March 9, 2007, Abbs filed an amended complaint in the circuit court of DuPage County, which also named Gerber and Noble as defendants and included a count for equitable accounting to Brandon by Lily's, Gerber and Noble and a count for the breach of Illinois Right of Publicity Act (Act) against Lily's, Gerber and Noble. Section 30 of the Act entitled "Limitations regarding use of an individual's identity" states in pertinent part:

"(a) A person 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 or persons specified in Section 20 of this Act or their authorized representative." 765 ILCS 1075/30(a) (West 2010).

¶ 14 On May 1, 2007, Gerber filed a motion to transfer venue to the circuit court of Cook county, which incorporated the motion to transfer venue previously filed by Lily's, alleging that DuPage county is an improper venue because Gerber is not a resident of DuPage county and that no transactions relating to the cause of action occurred in DuPage county. On October 3, 2007, the circuit court of DuPage county granted defendants' motion to transfer venue.

¶ 15 On March 6, 2008, Noble and Gerber filed a section 2-619 motion to dismiss alleging that: (1) Abbs waived any and all rights to Brandon's photographs; (2) Abbs consented to the use of Brandon's likeness and identity; and (3) the breach of the Act count was barred by the one year statute of limitations. On March 14, 2008, Lily's filed a motion for summary judgment alleging that: (1) all relevant documents and payments were tendered to Abbs; (2) Lily's never used Brandon's likeness for any public "commercial purpose;" and (3) the one year statute of limitation barred the breach of the Act count. Attached as an exhibit to Lily's motion for summary judgment was its president's affidavit, which stated that Lily's has not publicly: (1) sold any products bearing Brandon's identity; (2) advertised or promoted any products or services bearing his identity; or (3) used his identity for any fundraising purposes.

¶ 16 After the circuit court denied Noble's and Gerber's motion to dismiss, they filed a motion for summary judgment on August 26, 2008, claiming that: (1) Abbs consented to the use of the photographs; (2) Abbs was not entitled to information relating to the sales of Gerber products; and (3) they are not in possession of any documents that are subject to discovery by Abbs. On April 29, 2009, Abbs filed a cross-motion for summary judgment alleging that Lily's did not have

actual or apparent authority to permit the extended use of Brandon's photograph and that Noble and Gerber did not have the authority for the ongoing use of Brandon's photograph.

¶ 17 On March 26, 2010, the circuit court entered an order granting summary judgment in favor of Noble and Gerber finding that no genuine issue of material fact exists about whether Lily's gave Noble and Gerber written consent to use Brandon's likeness and photographs because Lily's admitted that it gave the consent and Abbs signed the release identifying Lily's as Brandon's agent. The circuit court further found that Noble and Gerber did not violate the Act between January 2001 and January 2004 because they were justified in using the photographs through January 2004 based on the prior written consent. However, the circuit court found that a genuine issue of material fact exists regarding Noble's and Gerber's use of the photographs and likeness from January 2004 through January 2007 because it is unclear whether Abbs had the opportunity to demand that Gerber stop using Brandon's likeness and photographs. Thus, the circuit court granted in part and denied in part Noble's and Gerber's motion for summary judgment. The circuit court granted Lily's motion for summary judgment in part finding that it did not use Brandon's likeness and photographs for a "commercial purpose" in violation of the Act, but denied the motion in part because a genuine issue of material fact existed as to whether Lily's agency authority continued beyond January 2004. Also, the circuit court denied Abbs's motion for summary judgment.

¶ 18 On August 12, 2010, the circuit court entered an order denying Abbs's motion for reconsideration finding that the evidence is incontrovertible that Lily's was Brandon's agent. The circuit court granted Noble's and Gerber's motion for reconsideration finding that Abbs created

the appearance of authority in Lily's to continue to act as Brandon's agent because she never demanded that use of Brandon's photograph cease and she did not tell Noble or Gerber that Lily's was not an authorized agent. On October 15, 2010, the circuit court entered a final judgment order for Noble and Gerber regarding Abbs's claims and for Lily's regarding Abbs's breach of the Act claim.

¶ 19 Abbs timely appealed the circuit court's granting of summary judgment in favor of Noble and Gerber and Lily's, and the order denying her motion for reconsideration. Abbs's brief on appeal incorporates her claim that the circuit court erred in granting summary judgment in favor of Noble and Gerber. On December 6, 2011, Abbs and Noble and Gerber filed a joint motion requesting, in part, that the cause be remanded to the circuit court for its approval of the settlement reached between Abbs and Noble and Gerber. This court granted the parties' motion on December 7, 2011. On January 25, 2012, Noble and Gerber filed a motion to dismiss the appeal. On February 2, 2012, this court dismissed the appeal against Noble and Gerber and ordered that the appeal remained pending as to Lily's only. This court also instructed Abbs to file a reply brief as to her claims against Lily's on or before February 27, 2012. Accordingly, this appeal addresses Abbs's claims only against Lily's.

¶ 20 ANALYSIS

¶ 21 Section 30 of the Act states:

"A person 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 or persons specified in Section 20 of this Act or their authorized representative." 765 ILCS 1075/30(a) (West 2010).²

The term "commercial purpose" is defined under the Act as:

"The public use or holding out of an individual's identity (I) on or in connection with the offering for sale or sale of a product, merchandise, goods or services; (ii) for purposes of advertising; or (iii) for the purpose of fundraising." 765 ILCS 1075/5 (West 2010).

The Act became effective on January 1, 1999, and codifies the common law right of publicity.

Brown v. ACMI Pop Division, 375 Ill. App. 3d 276, 283 (2007). This court reviews questions of statutory interpretation de novo. *Id.*

¶ 22 Summary judgment should be granted if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008); *People ex rel. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 220 (2006).

We review a circuit court's granting of a motion for summary judgment de novo. *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001).

² Expressly excluded from the Act's applicability are: (1) transactions attempting to portray, describe, or impersonate an individual; (2) use of an individual's identity for non-commercial purposes; (3) use of an individual's name in truthfully identifying the person as the author of a work, program or performance; (4) promotional materials, advertisements, or commercial announcements regarding the uses in items enumerated 1, 2, and 3; and (5) use of photographs, videotapes, and images by a person, firm, or corporation practicing the profession of photography. 765 ILCS 1075/35 (West 2010). The parties do not claim that these exemptions apply to the instant appeal.

¶ 23 In the amended complaint, Abbs claims that Lily's and Noble and/or Gerber agreed to extend the time period that Gerber was permitted to use Brandon's identity, photographs and likeness without Abbs's consent. Abbs also alleged that Lily's allowed the use of Brandon's identity for purposes of advertising or promoting products, merchandise, goods or services, or in connection with the offering for sale or sale of a product, merchandise, goods or services within the meaning of the Act. Abbs maintains that Lily's engaged in activities that were commercial in purpose because it promoted Brandon's likeness for use in the advertising or promoting of products, and to promote its own services. Thus, the issue on appeal turns on whether there is a genuine issue of material fact that Lily's did or did not use Brandon's photograph and image for a "commercial purpose."

¶ 24 We conclude that Lily's did not use Brandon's likeness for a "commercial purpose." An element of "commercial purpose," as defined by the Act, is the "public use or holding out of an image." See 765 ILCS 1075/5 (West 2010). We agree with Lily's that the transactions at issue in the case sub judice were not a "public use or holding out" because it did not disseminate Brandon's image to a party other than Noble and Gerber, and there are no facts supporting an allegation that Lily's used Brandon's photographs in its own advertisements distributed to the public in an effort to promote its talent agency business. In Lily Liu's affidavit, she identified herself as Lily's president and stated in pertinent part that "it has never sold, advertised or promoted any products to the public using Brandon Abbs's likeness or identity, including any images of him taken at the photo shoot on December 6, 2000. Any advertisements that Lily's has used to promote its agency services have not included any images of Brandon Abbs." Liu further

stated that "Lily's is not in the business of making, using, promoting, selling, or creating any products that are sold or held out to the public. Lily's acts solely as a talent and modeling agency that provides modeling services and conducts non-public business transactions with respect to providing such services." The facts in Liu's affidavit establish that Lily's did not disseminate Brandon's image or photographs to the public to sell goods or in promoting its services. Lily's use of Brandon's photograph and likeness were restricted to its interactions and transactions with Noble and Gerber, and not the public at large.

¶ 25 The fundamental rule of statutory construction "is to give effect to the intent of the legislature." *People v. Hari*, 218 Ill. 2d 275, 292 (2006). The legislature's intended meaning of "commercial purpose" was to prohibit transactions where an individual was using another's likeness or identity to make money, or to prohibit items bearing an individual's image from being sold to people. See 90th Ill. Gen. Assem., April 24, 1997, at 230-31. The genesis of the bill was to protect against the unauthorized use of a person's likeness for commercial purposes, and doing so without remunerating the individual or his family. See 90th Ill. Gen. Assem., April 24, 1997, at 8. During the bill's debate in the House of Representatives, putting a picture of a representative without his permission on the back of a CTA bus indicating that he endorses a particular kind of hair tonic and a food establishment stating that their cheeseburger and extra spicy chili were endorsed by Speaker Madigan were given as examples of transactions prohibited by the Act. 90th Ill. Gen. Assem., May 21, 1998, at 7-8. The legislative intent underlying the Act in conjunction with Liu's proclamation in her affidavit that Lily's never sold, advertised or promoted any products to the public using Brandon's likeness establishes that Lily's did not use

Brandon's likeness for a "commercial purpose." Moreover, we note that Abbs claims on appeal that publication of the photograph or likeness is not required under the Act thereby acquiescing and acknowledging that Lily's did not "publically use or hold out" Brandon's image and photograph. Nonetheless, Abbs claims that Lily's may be held liable under the Act because it acted as an intermediary by arranging for Noble's and/or Gerber's use of Brandon's image and photograph for "commercial purposes."

¶ 26 We disagree with Abbs that the Act provides for such derivative or vicarious liability. The express language used in a statute provides the best evidence of the legislature's intent in enacting the statute, and the words used must be interpreted using their plain and ordinary meaning. *Id.* When interpreting the meaning of a statute, we must not depart from its "plain language by reading into the statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent." *Id.* Keeping these cardinal rules of construction in mind, we now turn to consider the Act's express language to determine whether it supports Abbs's theory of liability against Lily's.

¶ 27 The Act's express language limits liability to the individual who uses another individual's identity for "commercial purposes." We know this to be true because section 30 of the Act states "A person may not use." (Emphasis added.) The Act's express language does not state that an individual would be liable not only for his own use of an individual's identity, but also for another individual's use of the identity. If the legislature intended that an individual would be liable under the Act not only for his own use of an individual's identity, but also if he arranges for the use of the identity by another individual, then such liability would have been expressly stated

in the Act's language. Abbs's claim that Lily's violated the Act because it acted as an intermediary by arranging for Noble's and/or Gerber's use of the photograph attempts to expand the scope of the limitations set forth in the Act beyond the express language used. We decline Abbs's invitation to read additional limitations into the statutory definition of "commercial purpose" where those limitations do not presently exist.

¶ 28 In sum, no triable issues of material fact exist associated with Lily's alleged use of Brandon's likeness in violation of the Act because it did not use his likeness for "commercial purposes." Thus, the circuit court did not err in granting summary judgment in Lily's favor.

¶ 29 CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court.

¶ 31 Affirmed.