

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

BRIAN CASTLE,

Plaintiff,

vs.

KINGSPORT PUBLISHING
CORPORATION,

Defendant.

2:19-CV-00092-DCLC

MEMORANDUM OPINION AND ORDER

Defendant Kingsport Publishing Corporation (Defendant) has filed a Motion for Summary Judgment [Doc. 54]. Plaintiff has responded [Doc. 66]. Plaintiff Brian Castle also filed a Motion for Partial Summary Judgment [Doc. 56], which Defendant opposed [Doc. 65]. Both motions address the same issue: whether Defendant's use of Plaintiff's Photograph violated Section 501 of the Copyright Act, 17 U.S.C. § 101 *et seq.* The matter is now ripe for adjudication.

I. FACTUAL BACKGROUND

The facts in this case are largely undisputed. In 2018, Sullivan County, Tennessee decided to build a new high school, which turned out to be an unpopular decision at the time. [Doc. 66-1, ¶ 22-23]. After construction began, a public debate ensued over whether they were constructing the school over sinkholes [Doc. 66-1, ¶ 24-25]. It became a "hot topic" with the Sullivan County Board of Education and in the community as a whole [Doc. 66-1, ¶ 28]. Numerous social media postings addressed the topic but because "no one could confirm them," Plaintiff set out to prove their existence with his drone [Doc. 66-1, ¶ 27]. Believing the

community should have “information about the construction site,” he flew his drone over the site in July 2018, and took “a drone image,” which became the Photograph at issue in this case [Doc. 66-1, ¶¶ 32- 33]. Plaintiff added the yellow descriptive text into the Photograph [Doc. 66-1, ¶ 43]. Plaintiff believed his Photograph proved they were building the high school over sinkholes [Doc. 66-1, ¶ 31].

On August 1, 2018, the Sullivan County Board of Education called a meeting to discuss the issue of “potential sinkholes at the West Ridge High School construction site.” [Doc. 66-1, ¶ 44]. Before the meeting, Plaintiff had the Photograph enlarged to 2 ft. x 5 ft. and gave it to school board member Mark Ireson so that he could use it at the meeting [Doc. 66-1, ¶ 44-48]. The meeting was a “completely packed house” with people overflowing “out in the parking lot.” [Doc. 66-1, ¶ 46]. Plaintiff attended the meeting and distributed about 10 copies of the Photograph, which circulated in the crowd [Doc. 66-1, ¶ 50]. He was not, however, identified as the source or creator of the handouts, and they did not contain any copyright notices. [Doc. 66-1, ¶ 53, 64].

At the meeting, board member Ireson displayed Plaintiff’s enlarged Photograph as evidence of possible sinkholes at the site [Doc. 66-1, ¶ 59]. And while many believed the Photograph showed evidence of the presence of sinkholes, the lead engineer did not [Doc. 66-1, ¶ 58, 60]. The geotechnical engineer for the project, Mr. Alex Merrit, however, explained that the geologic formations in the Photograph were not sinkholes at all but “were a result of blasting operations....” [Doc. 66-1, ¶ 60].

Plaintiff posted the Photograph and the drone footage on his Facebook page after the BOE meeting [Doc. 66-1, ¶¶ 67-67]. There were at least 3,500 views of his drone footage and Photograph on his Facebook page [Doc. 66-1, ¶ 70]. The day after the BOE meeting, on August

2, 2018, Plaintiff called a news outlet about licensing his Photograph. But he does not recall which specific news or media outlets he contacted about a license [Doc. 66-1, ¶¶ 76-77]. In any event, he never licensed the Photograph, nor did he make any money from the Photograph [Doc. 66-1, ¶ 78].

On August 8, 2018, Defendant published a news article which republished the Photograph Plaintiff had distributed as a handout at the BOE meeting on August 1, 2018 [Doc. 66-1, ¶ 88]. Defendant was unaware that Plaintiff had created the Photograph prior to using it in their news story [Doc. 66-1, ¶ 89]. Its article was about the public debate over whether geological formations depicted in the Photograph were the result of sinkholes or blasting during the construction of the high school [Doc. 66-1, ¶ 92]. Plaintiff acknowledges that Defendant's use of the Photograph was for "news reporting." [Doc. 66-1, ¶ 90].

Defendant displayed the Photograph at the top of its news article. [Doc. 55-2, pg. 143]. Defendant's article is reprinted here:



Images of "anomalies" Sullivan County school board member Mark Ireson identified as potential sinkholes turned out to be the result of rock blasting, an engineer told the school board Tuesday.

Engineer explains origin of 'sinkholes' on West Ridge High site

BLOUNTVILLE — The purported sinkholes on the site of Sullivan County’s future high school turned out to be pits formed by blasting rock, an engineer says.

That’s how Alex Merritt on Tuesday night shot down the drone images school board member Mark Ireson introduced last week, images Ireson presented as “anomalies” needing further investigation as possible sinkholes and a reason to delay awarding the construction bid for West Ridge High School.

Merritt, geotechnical engineer of record for the project and Tri-Cities branch manager for GEOServices LLC, told the Board of Education the purported sinkholes are nothing more than blasting pits left from dynamiting rock to level the site of the new school, which is scheduled to open in the fall of 2020. One photo indicated 139 F150 pickups would fit in the anomaly.

One pit was shown in drone photos Ireson shared with the BOE during a called meeting to vote on the West Ridge construction contracts, the same pit also shown in a drone video posted on Facebook. Merritt said that pit and a smaller one were simply the result of blasting.

“That is not a karst-induced sinkhole. That is blasting operations,” Merritt told the board after an introduction from architect Dineen West.

She had offered to call Merritt during last Wednesday’s called BOE meeting, during which a roomful of mostly school opponents faced the board. However, the BOE approved granting the low bids on the construction contracts totaling almost \$59.3 million, including \$4.8 million to be paid from fund balance and the rest from bond proceeds.

Merritt said that Ireson’s presentation at the called meeting focused on March 2017 information included in a bid packet and that additional investigation of possible sinkholes on the site had been done.

“That further review has been completed,” Merritt said.

He said initially five core borings were done on the site, but that after the footprint of the school was moved slightly, 12 new borings in “May or June” of this year were completed.

Ireson said he had asked for the results of the additional investigations, but Director of Schools Evelyn Rafalowski told him it “didn’t happen.”

After Merritt left, Ireson asked for the details on the second set of borings as well as any potential additional areas of concern the drilling might have revealed. West and Rafalowski said they would supply that information to the board.

After the meeting, West described the March 2017 “anomalies” language in bid documents as boilerplate for any major construction project in sinkhole-prone Northeast Tennessee.

During the BOE meeting, Rafalowski also presented a packet of documents indicating the Tennessee Department of Education had no findings, issues or problems with the way the school system has handled federal money for the past three years.

Ireson had said that auditor Dustin Winstead had told him an investigation of carryover federal funds and possible need for corrective actions would be initiated, but Winstead’s boss, Maryanne Durski, wrote a letter dated Monday saying that “no corrective actions were needed” on any federal audits.

“I think it was more of a misunderstanding than anything,” Rafalowski said.

[Doc. 55-2, pg. 143-45].

Defendant received about \$15.20 from indirect advertisements based on web traffic to the article [Doc. 66-1, ¶ 97]. It has not sold any copies of the Photograph or used it to promote or increase traffic to its website. [Doc. 66-1, ¶ 95, 96]. Plaintiff contends he would have charged Defendant \$4,000 to \$5,000 to license the Photograph, but readily admits he has never received that kind of money for any of the photographs he has ever created [Doc. 66-1, ¶ 98-99].

Plaintiff sued Defendant under Section 501 of the Copyright Act, claiming that Defendant reproduced without authorization his Photograph which Plaintiff owned and had registered [Doc. 1, pg. 1]. Defendant filed a Motion to Dismiss, asserting a “fair use” affirmative defense to Plaintiff’s case [Doc. 26]. The Court denied his motion [Doc. 46] finding that the Court could not adequately address whether Defendant’s use constituted “fair use” simply on the pleadings, without more contextual information. Since that denial, Defendant has filed its Motion for Summary Judgment, claiming there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

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