

**IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE**

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IN RE: MICHAEL JEROME WILLIAMS, JR.  
A/K/A MICHAEL JEROME OHER

CAUSE NUMBER: C-010333

MICHAEL JEROME OHER  
PETITIONER AND FORMER WARD

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**RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY INJUNCTION**

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COME NOW the Respondents, Sean Tuohy and Leigh Anne Tuohy, by and through counsel, Randall J. Fishman and Steve Farese, and files this their Opposition to the Motion for Temporary Injunction. Mr. Oher's motion should be denied because there is little-to-no probability he will succeed on the merits; because the Tuohys are not engaged in commercial use of his name, likeness or image as protected under the TPRPA; because any use of Mr. Oher's name, likeness, or image would be considered fair use under TENN. CODE ANN. § 47-25-1107(a); and because the granting of a temporary injunction would constitute a prior restraint on the Tuohys' First Amendment free speech rights. In further support, the Tuohys would state and show as follows:

FACTS

The Tuohys first encountered Mr. Oher when he was a high school student at Briarcrest Christian School in Collierville. At the time Mr. Oher was not even able to participate in athletics due to his academic standing Mr. Oher moved in with the Tuohys sometime during his junior year and the Tuohys provided him with food, clothing, and shelter, as well as the intangibles of encouragement and the support of a loving family. Mr. Oher's academic standing subsequently improved, and he was able to participate in high school athletics. In 2004, Mr. Oher visited a



number of colleges, including the University of Mississippi, with an eye toward playing college football on an athletic scholarship. Because Sean Tuohy was considered a booster of the University of Mississippi under NCAA regulations, it was necessary for the parties to enter into the Conservatorship approved in this Court by the Hon. Robert Benham on or about Dec. 7, 2004, to memorialize that, in providing Mr. Oher with food, shelter and support, the Tuohys acted as legal guardians of Mr. Oher, and that he was therefore eligible under NCAA rules to play for the University of Mississippi. Notably, the Tuohys were made “Conservators of the Person,” as there was no financial estate to administer. Mr. Oher went on to play four years of college football at the University of Mississippi, followed by a successful eight-year NFL career.

In or around 2005, author Michael Lewis wrote a book entitled “The Blind Side” which featured, among other things, the story of the Tuohy family and their efforts to assist Mr. Oher so that he could realize his dream of playing college football. The book was subsequently made into a major Hollywood motion picture. The studio, 20th Century Fox, submitted a “Life Story Rights Agreement” which was signed by all members of the Tuohy family. A separate agreement was signed by Mr. Oher, where he was personally represented by an agent. Due to then existing rules and regulations of the NCAA Mr. Oher could not receive money independently. The family, including Mr. Oher, came to a verbal agreement to divide the proceeds from the book and movie revenues evenly. Mr. Oher received and accepted one-fifth of the total payments on his agreed share of the proceeds through 2016. Shortly thereafter, Mr. Oher was forced to retire from the NFL due to concussions and/or other injuries.

Around that time, perhaps because he was no longer making significant amount of money as a professional athlete, Mr. Oher became increasingly estranged from the Tuohys, believing incorrectly that they had not paid him the money he was owed, and he later began demanding

money through texts and emails. See, e.g., text correspondence attached as Ex. A (Mr. Oher repeatedly demands \$15 million from the Tuohys and threatens to defame them on social media and/or TMZ as “fakes” and “thieves”). Mr. Oher has made demands for money by text message on at least two occasions, demanding the sum of \$10 million on one occasion and further raising his demand to \$15 million on a second occasion. Further, Mr. Oher set a payment deadline with the threat to go to social media and expose to the world how he was robbed by “*by his parents.*” Mr. Oher sent menacing texts threatening to go public with his wild accusations that he was allegedly “*robbed of 50 million+,*” insisting that “*10 million is my final offer,*” and threatening that “*TMZ will have it first*” if his demands were not met. To further those threats, he ominously sent a proposed complaint to be filed in the Circuit Court of Shelby County, Tennessee, warning “*Next place is national,*” followed by texts demanding that the Tuohys “*get my money together,*” calling them “*Thieves.*”

Mr. Oher menacingly warned in another text that “*If something isn't resolved this Friday, I'm going to go ahead and tell the world, how I was robbed by my suppose to be [sic] parents. That's the deadline.*” He followed that up with a text telling the Tuohys to “*Think how it will look when this comes out.*” Because the Tuohys did not yield to his demand for \$10 million, Mr. Oher increased his threat, texting, “*It was 10 million now I want 15 after taxes [sic].*” Needless to say, the menacing demands were shocking and hurtful to the Tuohys, who had always treated Mr. Oher with kindness and love.

Mr. Oher subsequently began refusing payments on his agreed share of the book and movie proceeds. As a result, the Tuohys deposited his share in an account in the name of his son, Michael Oher, Jr. See generally Accounting filed Nov. 8, 2023. Mr. Oher's sworn petition accuses the Tuohys of using the conservatorship to reap millions of dollars for themselves while paying Mr.



Oher nothing. In fact, the accounting filed on Nov 8, 2023, and further bolstered by public statements by Alcon Entertainment, LLC., supports the fact that the total sum received by each of the Tuohys and by Mr. Oher was identical: \$138,309.90.

Building on the success of the book and movie “The Blind Side,” the Tuohys established a charitable foundation, “The Making it Happen Foundation,” and Mrs. Tuohy authored best-selling books and engaged in motivational public speaking based on their family story. Opposing counsel has very helpfully included promotional material from Mrs. Tuohy’s website as Ex. A to Mr. Oher’s motion, and Respondents would encourage this Court to review same. In fact, Mr. Oher on two occasions has sent text messages to Leigh Ann Tuohy, telling her that she could talk to whomever she wanted. (See text message exhibits marked as collected exhibit B.) He told her, “*U can talk about whatever u want I don’t care about all that stuff anymore,*” explaining that doing so “*is great for plp so other plp can get help [sic],*” and that “*at the end of the day it’s all good.*” He gave Mrs. Tuohy permission to talk about whatever she wanted (although no such permission was necessary for her to speak about Mr. Oher in connection with her family, for the reasons explained herein). To the extent Mr. Oher is referenced in the promotional materials it is because he was *part of the story* of the Tuohy family’s experience; however, the story of the “Blind Side,” the work of the Foundation, and the ongoing subject of the books and motivational speaking is not “about” Mr. Oher *per se*, it is about the *family’s* experiences and about doing good in the world.

Finally, Mr. Oher complains that the Tuohys have publicly misrepresented him as their “adopted son.” This is, in fact, how the Tuohys feel about Mr. Oher, even now, notwithstanding the ways in which he has engaged in a vindictive and unfounded legal and reputational crusade against them. The use of the term “adopted” was always meant in its colloquial sense to describe

the family relationship the Tuohys felt with Mr. Oher; it was never meant as a legal term of art.

### LAW & ARGUMENT

As an initial matter, Mr. Oher's motion is procedurally defective because he did not seek injunctive relief by way of sworn petition. See TENN. R. CIV. P. 65.04(2) (requiring "verified complaint, affidavit, of other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend render such final judgment ineffectual).

Assuming, arguendo, Mr. Oher successfully takes steps to remedy this procedural deficiency, he is nonetheless not entitled to injunctive relief in this matter. Tennessee courts consider four factors in determining whether to issue a temporary injunction: (1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest. Fisher v. Hargett, 604 S.W.3d 381, 394 (Tenn. 2020) (citations omitted). A plaintiff's failure to show likelihood of success on the merits is usually fatal to his request for injunctive relief. Id. Here, Mr. Oher advances a fundamentally flawed theory that the Tuohys are infringing on his statutorily recognized property right in his name, likeness, and image pursuant to TENN. CODE ANN. § 47-25-1106. Because Mr. Oher is wrong on the facts and wrong on the law, he has a near-zero likelihood of success on the merits, and all four factors weigh heavily against the granting of a temporary injunction.

The Tennessee Legislature codified the common-law right of publicity in 1984 when it enacted the Tennessee Personal Rights Protection Act ("TPRPA"), TENN. CODE ANN. § 47-25-1101, *et seq.* As a result, Tennessee's common law and statutory rights of publicity are coextensive



and limited to *commercial use* for purposes of advertising or soliciting a product or service. Gauck v. Karamian, 805 F. Supp. 2d 495, 500 n.5 (W.D. Tenn. 2011) (McCalla, J.) (citing, *inter alia*, State ex rel. Elvis Presley Int'l Mem. Foundation v. Crowell, 733 S.W.2d 89 (Tenn. Ct. App. 1987); Elvis Presley Enters., Inc. v. Elvisly Yours, Inc., 936 F.2d 889 (6<sup>th</sup> Cir. 1991)) (emphasis added).

The key element to be emphasized here is the statute only protects “commercial use” of name, likeness, and image; not any and all uses for non-commercial purposes. The statute was intended to create a property right for those people who use their names or likenesses in a commercial manner, such as an entertainer or sports figure, who uses his name for endorsement purposes. Wells v. Chattanooga Bakery, Inc., 448 S.W.3d 381, 390 (Tenn. Ct. App., 2014) (citation omitted). The

TPRPA provides in pertinent part:

Any person who knowingly uses or infringes upon the use of another individual's name, photograph, or likeness in any medium, in any manner directed to any person other than such individual, as an item of commerce for purposes of advertising products, merchandise, goods, or services . . . without such individual's prior consent . . . shall be liable to a civil action.

TENN. CODE ANN. § 47-25-1105(a). “[T]he TPRPA speaks in terms of the use of an individual's name, photograph, or likeness “for purposes of advertising products, merchandise goods or services.” Marshall v. ESPN, Inc., 111 F. Supp. 3d 815, 827 (M.D. Tenn. 2015) (Sharp, J.) (citing Clark v. Viacom Int'l, Inc., 2014 WL 1934028 at \*15-16 (M.D. Tenn.) (only the use of an individual's identity in advertising infringes on the persona); Apple Corps Ltd. v. A.D.P.R, Inc., 843 F. Supp. 342, 347 (M.D. Tenn. 1993) (the statute narrowed the common law prohibition, proscribing only the unauthorized use of another's name or likeness in advertising).

Here, Mr. Oher does not have a claim against the Tuohys under the TPRPA because any use of his name, likeness, or image by the Tuohys is not a “commercial use,” but rather is simply *a factual part of the underlying story of their family's experiences* as reflected in the book and

subsequent movie “The Blind Side.” As recognized by Judge McCalla in Gauck, a claim for publicity rights under the statute fails on its face if the defendant does not use plaintiff’s name or likeness for purposes of advertising or soliciting any goods or services:

The TPRPA “does not prohibit *all* unauthorized uses of another’s name or likeness.” Apple Corps, 843 F. Supp. at 347 (emphasis in original). Rather, the statute is “narrowly drawn,” *id.*, “proscribing only the unauthorized use of another’s name or likeness in advertising.” *Id.* at 347, n.2. The limited scope of uses prohibited by the statute was explained in Apple Corps. In a Beatles look-alike performance case, the court granted the plaintiff’s motion for partial summary judgment, finding that, while the defendants’ advertisements for their performances did violate the TPPRA, the performances themselves did not. *Id.* at 347-49. Even though the defendants engaged in the performances as a commercial endeavor, the court reasoned that defendants’ use of the Beatles’ personas during the performances and the Beatles logo on the group’s bass drum did not violate the TPRPA because the statute only forbids use of name or likeness for the purpose of “advertising” or “soliciting” purchases of goods or services. *Id.*

Gauck, 805 F. Supp. 2d at 501. The same rationale was articulated by Judge Sharp in the Middle District of Tennessee in Marshall, where college basketball and football players attempted to bring a class action against certain broadcasters based on the use of the athletes’ names, likenesses, and images in the sports broadcasts themselves. The court found, among other things, that the plaintiff *student athletes failed to show that their names, likenesses, or images were used to advertise any specific products* unrelated to the sports broadcast. Marshall, 111 F. Supp. 3d at 827-28. Furthermore, the court relied on the fair use provision of the TPRPA, which states that “[i]t is deemed a fair use and no violation of an individual’s rights shall be found, for purposes of this part, if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account.” *Id.* at 827 (citing TENN. CODE ANN. § 47-25-1107(a) (internal quotations omitted)). The fair use carve-out covers the use of a person’s name, likeness, or image in a *factual* context as opposed to an *advertising* or endorsement context, which is exactly the circumstance before the Court in the instant case. *The use of Mr. Oher’s name, likeness, or image*



*in the factual telling of the Tuohy family story, which includes Mr. Oher, falls squarely within the fair use provision in § 47-25-1107(a).*

Using a person's name, likeness, or image relating a factual story, whether in a biography, or a documentary, or in a motivational speech recounting family experience, is neither an advertisement nor an endorsement, nor otherwise a commercial use prohibited by the TPRPA. The New York case of Porco v. Lifetime Entertainment Servs., LLC, 150 N.Y.S 3d 380 (N.Y. App. Div. 2021) is persuasive authority on the issue before this Court. New York has a privacy statute very similar to the TPRPA, which provides for liability where a living person's name portrait or picture is used for advertising or trade purposes without having first obtained the written consent of such person. Id. at 383 (citing, *inter alia*, N.Y. CIV. RIGHTS LAW §§ 50-51). In Porco, the plaintiff was a convicted murderer who was the subject of a film that depicted the events surrounding the crime, investigation, and criminal prosecution. Id. at 382. The plaintiff alleged that the film and related promotional material violated the New York privacy statute via commercial, non-consensual use of his name, likeness, and personality. Id.

The court in Porco analyzed the application of the newsworthiness exception to the right of publicity as follows: "As a result of both the narrow scope of the statutory provisions and the need to avoid a fatal conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest guaranteed by the First Amendment . . . courts have recognized that the [statutory] provisions do not apply to reports of newsworthy events or matters of public interest, even if the reports were produced with profit in mind. 150 N.Y.S. 3d at 383 (citations and internal quotations omitted). "Newsworthiness is given a broad definition and includes not only descriptions of actual events, but also descriptions of political happenings, social trends or any subject of public interest." Id. "It is therefore clear that many types of artistic expressions,



including literature, movies, and theater . . . whether intended as entertainment or not, can be newsworthy and can further the strong societal interest in facilitating access to information that enables people to discuss and understand contemporary issues.” Id. at 384. “The newsworthiness exception will not apply to the depiction of an individual in such a work, however, if the depiction’s newsworthy or public interest aspect is merely incidental to its commercial purpose.” Id. Accordingly, where there is a lack of a reasonable connection between the use of an individual’s name or likeness and a matter of public interest, or where the purported aim of the work is to provide biographical information of obvious public interest, but the content is substantially fictionalized and does not serve that interest, it will not be protected by the newsworthiness exception. Id.

After reviewing the film in question, the court in Porco found that although it was admittedly a “docudrama,” it nonetheless passed the newsworthiness test:

. . . [T]he film is a dramatization that at times departed from actual events, including by recreating dialogue and scenes, using techniques such as flashbacks and staged interviews, giving fictional names to some individuals and replacing others altogether with composite characters. The film nevertheless presents a broadly accurate depiction of the crime, the ensuing criminal investigation and the trial that are matters of public interest. More importantly, the film makes no effort to present itself as unalloyed truth or claim that its depiction of plaintiffs was entirely accurate, instead alerting the viewer at the outset that it is only “[b]ased on a true story” and reiterating at the end that it is “a dramatization” in which “some names have been changed, some characters are composites and certain other characters and events have been fictionalized.” In our view, the foregoing satisfied defendant’s initial burden of showing that the film addressed matters of public interest through a blend of fact and fiction that was readily acknowledged, did not mislead viewers into believing that its related depictions of plaintiffs was true and was not, as a result, “so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthiness exception.

150 N.Y.S. 3d at 386 (citations omitted). The Porco court similarly disposed of plaintiff’s claim regarding the use of his name and likeness in promotional materials, reasoning that said materials



“cannot reasonably be read to assert that plaintiff endorsed or recommended the films and were ancillary to the protected use in the film itself.” Id. at 387 (citations omitted).

In this case, Mr. Oher did not have a statutorily recognized interest under the TPRPA in his depiction in the book and film, “The Blind Side,” because, like the true-crime docudrama in the Porco case in New York, his rise from poverty to a college football and NFL career, with the help of the Tuohys, was and is a matter of public interest, and his depiction was a factual part of the story. Likewise, Mr. Oher does not have an actionable TPRPA claim against the Tuohys for the use of his name, likeness, or image with respect to their non-profit Foundation and/or Mrs. Tuohy’s books and speaking engagements arising from the success of “The Blind Side” because Mr. Oher is a factual part of the Tuohy family’s own history.

Additionally, the specter of a temporary injunction raises grave concerns as to the prior restraint of free speech. In Baskin v. Royal Good Prods. LLC, 2021 WL 6125612 (M.D. Fla.), a request for injunctive relief to prevent the airing of the Netflix series “Tiger King 2” was denied even where there was an acknowledged dispute concerning the contractual validity of the plaintiffs’ appearance releases.

A court ordered injunction enjoining the viewing of an expressive work prior to its public availability is a prior restraint. See Cooper v. Dillon, 403 F.3d 1208, 1215 (11<sup>th</sup> Cir. 2005) (“Classic prior restraints have involved judge-issued injunctions against the publication of certain information.”). A prior restraint on expression bears a “heavy presumption against its constitutional validity,” New York Times Co. v. United States, 403 U.S. 713, 714 (1971), because “speech on matters of public concern . . . is at the heart of the First Amendment’s protection.” Snyder v. Phelps, 562 U.S. 443, 452 (2011) (internal citations and quotations omitted). Thus, “this ‘most extraordinary remed[y]’ [is appropriate] only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.” CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (quoting Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 526 (1975)).

“Speech on matters of public concern” is a broad concept. “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a



subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” Snyder v. Phelps, *supra*, 562 U.S. at 453 (internal citations and quotations omitted). Additionally, the arguably “inappropriate or controversial character of [the expression] is irrelevant to the question whether it deals with a matter of public concern.” Rankin v. McPherson, 483 U.S. 378, 387 (1987).

Baskin, 2021 WL 6125612 at \* 4. By contrast, commercial speech is an area of limited protection under the First Amendment. Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 925 (N.D. Ohio 2004) citing Virginia St. Bd. of Pharm. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)). “[T]he informational function of advertising is impaired when one wrongfully appropriates another’s image for commercial purposes. The underlying deception is the myth that an individual actually endorses or supports a product when, in fact, [he or] she does not.” *Id.* (citation omitted). “Consequently, those who violate one’s right to publicity are not automatically shielded from liability by the First Amendment.” *Id.* This distinction between speech on matters of public interest, which enjoys broad Constitutional protection, and commercial speech, which does not, closely tracks the analysis of the exceptions to publicity rights in name, likeness, and image for “newsworthy” material and/or the statutory fair use carve out for news and public affairs. This is perhaps an obvious point because otherwise injunctive relief under the TPRPA (or similar statutes in other states) would be patently unconstitutional.

Here, the use of Mr. Oher’s name, likeness, or image by the Tuohys in the context of their charitable Foundation or Mrs. Tuohy’s speaking engagements is protected speech because Mr. Oher is a part of their personal and family story; it is not commercial speech in the form of an advertisement or solicitation. The protected speech in question is designed to encourage ordinary people to make a difference in the lives of people like Mr. Oher. The granting of an injunction would therefore be an unconstitutional prior restraint on their First Amendment rights to freedom of speech.



Returning to the elements this court should consider in deciding whether to grant a temporary injunction, Respondents would submit that the probability that Mr. Oher succeeds on the merits of his TPRPA claim is almost nil because there is no commercial use involved on these facts, and/or because the fair use provision of the statute applies to the Tuohys' factual expression of their personal story behind the well-known movie "The Blind Side." Consequently, there is no harm to Mr. Oher if the injunction is not granted because he does not have a protected interest in the use of his name, likeness, or image in a *factual* – as opposed to commercial – manner, the harm to the Respondents in granting the injunction would be great because it would constitute a prior restraint on free speech, and the public interest would not be served by placing a gag order on the Tuohys prohibiting them from fully telling their story, which includes Mr. Oher, in the context of their charitable work and motivational speaking.

The Respondents encourage the court to deny the request for Temporary Injunction. Should this court determine that injunctive relief is appropriate (which it should not), the Respondents suggest the revenues from speaking engagements should be used as a yardstick to determine the appropriate bond.

#### CONCLUSION


Based on all the foregoing, this Honorable Court should deny Mr. Oher's motion for a Temporary Injunction. The four factors to be considered by the Court weigh heavily against granting the injunction, especially the fact that there is little to no probability Mr. Oher will succeed on the merits. The Tuohys are not engaged in commercial use of Mr. Oher's name, likeness or image as protected under the TPRPA; Mr. Oher was a part of their family story in the events that led to the movie, "The Blind Side," and their use of his name, likeness, or image in continuing to tell that story is not an advertisement or a solicitation for goods and services. Additionally, the



Tuohys' use of Mr. Oher's name, likeness, or image falls within the fair use exception under TENN. CODE ANN. § 47-25-1107(a). Finally, the granting of a temporary injunction on these facts would restrict the Tuohys' speech on a matter of public interest and would constitute a prior restraint on their First Amendment free rights.

Respectfully submitted,

BALLIN, BALLIN & FISHMAN, P.C.



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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on this the 4th day of December, 2023, a true and correct copy of the foregoing Response has been sent via the Court's ECF system, U.S. Mail and/or electronic mail to the following:

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