[Cite as *Duer v. Henderson*, 2009-Ohio-6815.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

MELISSA DUER, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 2009 CA 15

v. : T.C. NO. 08-94

ANDREW HENDERSON, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellees :

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OPINION

Rendered on the 23rd day of December, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Melissa Duer, et al. filed April 28, 2009. On January 25, 2008, Duer, individually, and as successor trustee for the Chalmer S. Staley Trust, as alternate successor trustee for the Carol M. Mumford Trust, and as administrator of the estate of Carol M. Mumford, filed a Complaint for Money Damages against

Andrew Henderson, James Willis, Loren Coleman, Sterling Publishing Co., Inc., Mark Sceurman, and Mark Moran. A complaint against these defendants, styled *Mumford v. Henderson*, was previously filed on July 14, 2006, and it was voluntarily dismissed on September 25, 2006. The plaintiffs therein were Carol M. Mumford, individually and as trustee for the Carol M. Mumford Trust, and Duer, who is Mumford's daughter.

{¶ 2} Duer holds title as tenant in common to a one-half interest of real property located at 7095 Staley Road, in New Carlisle, where she resides with her husband. According to Duer, the "Staley Farm has been in uninterrupted possession of the Staley Family since Elias Staley purchased it from John Rench in 1825 until the current owner and direct Staley descendent, Melissa Duer." The property is home to a mill structure which has significant historical status in the United States. Mumford co-authored a book about the property, entitled *"A History of Elizabeth Township,"* and Duer's complaint asserts that the book "reports the definitive history of the Staley Farm, the Staley Mill, and the families that have resided there from its construction to the present-day occupants."

{¶ 3} Duer asserts that the defendants "participated in the writing, publishing, and sale of a book titled 'Weird Ohio' which was first available in Miami County, Ohio, in December of 2005," and that they "participated in the writing, publishing and dissemination of materials on the website [forgottenoh]" and that both the book and the web site "contain numerous statements and claims about the Staley Farm and the Staley family." As a result of the defendants' actions, Duer asserts that the "Staley Farm continues to be repeatedly trespassed upon and vandalized."

{¶ 4} The front cover of *Weird Ohio* proclaims the book to be "Your Travel Guide to Ohio's Local Legends and Best Kept Secrets." One chapter is entitled, "Murder and Mayhem on

Staley Road," and it briefly describes the history of the Staley Mill. The chapter further provides, "As with any good legend, this one is short, bloody and vague. The story centers around 'Old Man Staley,' who apparently was not such a nice man after all. One night, according to the legend, he snapped and murdered his entire family and everyone else in the house, including the servants. When the bloody killing spree was over, Staley somehow turned the ax on himself and took his own life.

{¶ 5} "Today, it is said that if you drive down Staley Road late at night, an invisible force will grab hold of your car, causing it to do everything from swerving wildly to stalling out. Some have also reported headlights dying or horns 'getting stuck' and honking continually. There are even reports of seeing the ghost of Old Man Staley walking through the woods or pacing around the ruins of his old mansion.

{¶ 6} "It's interesting to note that while the Staley family's claim to fame was the mill, it doesn't play much of a role in the legend. Instead, most of the ghostly activity is said to take place in the woods along Staley Road. * * * ." The end of the chapter contains a reprint of an allegedly anonymous email message describing a frightful experience on Staley Road.

{¶ 7} Duer's complaint asserted claims for trespass to land, slander of title, incitement to imminent lawless action, civil aiding and abetting, two claims of invasion of privacy (false light and unreasonable publicity given to the other's private life or appropriation of the plaintiff's name or likeness), intentional or reckless infliction of emotional distress, negligent infliction of emotional distress, and punitive damages.

{¶ 8} The defendants moved to dismiss Duer's complaint, and on April 11, 2008, the trial court overruled the motion as to Duer's cause of action for trespass to land, for civil aiding

and abetting, for invasion of privacy (false light) as to Duer individually, for intentional infliction of emotional distress and for punitive damages; it granted the motion as to Duer's cause of action for slander of title, for incitement to imminent lawless action, for invasion of privacy (false light) as to the trust and estate, for invasion of privacy (unreasonable publicity or wrongful intrusion into the plaintiff's private activities), and for negligent infliction of emotional distress.

{¶ 9} Willis, Coleman, Moran, Sceurman and Sterling Publishing ("Appellees") moved the court for summary judgment on the remaining claims. Duer filed a motion for summary judgment against Henderson, and she moved the court for an extension of time to respond to Appellees' motion for summary judgment.

{¶ 10} The court overruled the motion for an extension of time. Duer also filed a motion for leave to file an amended complaint, and a motion to extend the discovery cutoff and continue the trial date of March 17, 2009, which the court also overruled.

{¶ 11} On March 5, 2009, the trial court granted Appellees' motion for summary judgment on Duer's remaining claims, and it dismissed the case as to Appellees. Duer filed a motion to reconsider her motion for an extension of time to respond to Appellees' summary judgment motion and to vacate the court's entry granting summary judgment, which the court overruled.

{¶ 12} On March 9, 2009, the court issued an Entry that provides that the matter came on for a final pretrial conference pursuant to the court's scheduling order, and that Henderson failed to appear and failed to submit a settlement/final pretrial conference report. The court struck Henderson's Answer from the record "as an appropriate sanction."

{¶ 13} Duer orally moved for default judgment against Henderson, and she filed a motion to amend her prayer for relief, seeking to enjoin Henderson from maintaining a website that "publiciz[es] the false story about the Staley family and property." On April 9th, the trial court, following a hearing that Henderson failed to attend, granted default judgment in favor of Duer and also granted Duer's motion to amend the prayer of relief. The court awarded Duer "damages, including attorney fees, in the amount requested, $129,794.11 plus interest from the date of this judgment at 5% per annum and the costs of the action," and it further enjoined Henderson "from maintaining reference to the Staley story on his website, or creating other references to the Staley property on another website."

{¶ 14} Duer asserts four assignments of error. Her first assignment of error is as follows:

{¶ 15} "THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANT'S MOTION FOR ADDITIONAL TIME TO RESPOND TO APPELLEES' MOTION FOR SUMMARY JUDGMENT."

{¶ 16} In overruling Duer's motion, the trial court determined, "Not only has sufficient time been allotted the parties but the Plaintiff had sufficient time to prepare and file her motion for summary judgment against Defendant Andrew Henderson.

{¶ 17} "A response to the other Defendants' motion could just have easily been prepared."

{¶ 18} According to Duer, she requested additional time to "allow depositions which had already been taken to be filed pursuant to Civ.R. 30." Duer asserts a "sufficient basis for a continuance and further discovery is a finding that the moving party is in exclusive knowledge or

control of facts concerning the central issue of the motion for summary judgment." Duer argues that at the time of her motion for a continuance, "several depositions had been taken, including the deposition of James Willis and Mark Moran. However, those depositions had not been reviewed and signed, as required by Civ.R. 30 and could neither be filed nor used as evidence." Duer asserts that the Moran and Willis depositions contained facts "which were solely within the knowledge of Appellees and were not obtainable from any other source." Duer asserts that the claims against Henderson and the Appellees have a similar legal basis, but that "the material facts supporting the claims are different." Finally, Duer asserts that the trial court violated her right to substantial justice under Civ.R. 61 in denying her motion for a continuance and granting the motion for summary judgment the next day.

{¶ 19} Appellees respond, "During more than ten months of discovery, Appellants did virtually nothing. Then after the close of discovery, and just four weeks before trial, Appellants moved for additional time to respond to Appellees' motion for summary judgment. Although thirteen depositions in total were taken, Appellants took only two, and one, the deposition of Appellee Mark Moran (a resident of New Jersey), they did not request until one week before the close of discovery." Appellees assert that Duer's "failure to conduct any significant discovery, to timely seek leave to file their amended complaint, or to marshal any evidence in support of their existing or proposed claims warranted the court's denial of their Rule 56(F) motion * * * ." Appellees further assert that Duer was not denied substantial justice.

{¶ 20} A trial court's procedural rulings will not be reversed absent an abuse of discretion. *Harmon v. Baldwin*, 107 Ohio St.3d 232, 2005-Ohio-6264, ¶ 16. "'Abuse of discretion' connotes an unreasonable, arbitrary, or unconscionable attitude." Id. (citation

omitted).

{¶ 21} Civ.R.56(F) allows the trial court to grant a continuance so that a party may obtain additional discovery in order to oppose a motion for summary judgment. "Because summary judgment is generally disfavored when there is a realistic possibility that genuine issues of material fact exist, the court's discretion with respect to a Civ.R. 56(F) motion should be exercised liberally in favor of a party who proposes a reasonable period of time to obtain discovery necessary to oppose the motion for summary judgment." *Wombold v. Barna* (Dec. 11, 1998), Montgomery App. No. 17035 (Citation omitted). "A party seeking a Civ.R. 56(F) continuance has the burden of establishing a factual basis and reasons why the party cannot present sufficient documentary evidence without a continuance." *Shirdon v. Houston*, Montgomery App. No. 21529, 2006-Ohio-4521, ¶ 10. "Moreover, '* * * the burden is upon the party seeking to defer the court's action on a motion for summary judgment to demonstrate that a continuance is warranted.' (Citation omitted)

{¶ 22} "The party seeking additional time must do more than merely assert generally the need for additional discovery. 'Mere allegations requesting a continuance or deferral of action for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment. There must be a factual basis stated and reasons given why it cannot present facts essential to its opposition to the motion.' (Citation omitted). 'Furthermore, a judgment preventing the requesting party from pursuing discovery will not be reversed unless the ruling causes substantial prejudice.'" (Citation omitted). *Wombold.*

{¶ 23} Civ.R. 32(A) provides, in part, "Every deposition intended to be presented as

evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing." "The filing requirement is intended 'to prevent surprise to the party against whom the deposition is to be used and to place the document with the court prior to the proceedings.'" *Weiner v. Kwiat*, Montgomery App. No. 19289, 2003-Ohio-3409, ¶ 145.

{¶ 24} On May 22, 2008, the trial court set a discovery deadline of February 6, 2009, a summary judgment deadline of February 9, 2009, and a response to summary judgment deadline, pursuant to Loc.R.3.03, "by the fourteenth day after the day on which the motion was filed." Duer filed her request for additional time on February 17, 2009. In support of her request, Duer relied upon the affidavit of her attorney, which provides that he deposed Willis on January 30 and Moran on February 16, 2009 (after the deadline, by agreement of the parties). Willis and Moran did not waive signing their depositions and, according to Duer, "Plaintiff is unable to obtain the information contained in these depositions from any other source and will be unable to adequately respond to Defendant's motion for summary judgment until these depositions are filed."

{¶ 25} Under the circumstances, we cannot conclude that the trial court abused its discretion in refusing to grant a continuance. As Appellees assert, from the date of the original filing, Duer had ample time to establish some connection between the alleged trespassers and the publication of the book *Weird Ohio*. Importantly, the affidavit of Duer's counsel does not assert that specific future discovery was needed to respond to Appellees' summary judgment motion. See, for example, *Hartwell v. Volunteers of America* (1987), 2 Ohio App.3d 37 (finding that trial court erred in failing to rule on motion for continuance where supporting affidavit stated that "the

facts concerning the issue of whether the driver of defendant's truck was acting within the scope of his employment at the time of the accident is totally within the knowledge of defendant, its officers and employees. Because said issue is central to the determination of the motion for summary judgment, plaintiffs have demonstrated sufficient reasons why they cannot oppose the motion for summary judgment by affidavit.")

{¶ 26} While Duer asserts, for the first time in her Reply Brief, that she "sought additional time in her motion to locate and interview trespassers on the property," such a reason was not presented in the affidavit supporting Duer's motion, and such "mere allegations requesting a continuance" for the purpose of discovery are insufficient. *Wombold*.

{¶ 27} The fact that the depositions had not been filed did not prevent Duer from relying upon them in drafting a response to Appellees' motion for summary judgment, and Duer has provided no authority to the contrary. In fact, Duer supported her own February 11, 2009 motion for summary judgment against Henderson in part with the deposition of Jacob Jones, although Jones' deposition was not filed with the court until February 26, 2009. Willis' deposition, and the depositions of several other witnesses are also attached to Duer's summary judgment motion. We further note that Duer cited to Willis' deposition in her Motion for Leave to File Amended Complaint and referred to Moran's deposition in her Motion to Continue Trial Date and Extend Discovery Cutoff Date, belying her claim that the information in the unfiled depositions was "solely within the knowledge or possession of Appellees."

{¶ 28} Finally, we agree with Appellees that the trial court's action in granting Appellees' motion for summary judgment the day after denying the request for the continuance was not "inconsistent with substantial justice." Civ.R. 61. See *Dorriott v. M.V.H.E., Inc.*,

Montgomery App. No. 20040, 2004-Ohio-867, ¶ 47 (finding no abuse of discretion in denying continuance and granting unopposed summary judgment on the same day "where the party's own lack of diligence undermines any claim that sufficient reasons exist" to grant a continuance.)

{¶ 29} Given Duer's lack of diligence and delay, the trial court did not abuse its discretion in overruling the motion for additional time to respond to Appellees' motion for summary judgment, and Duer's first assignment of error is overruled.

{¶ 30} Duer's second assignment of error, including its subparts, is as follows:

{¶ 31} "THE TRIAL COURT ERRED IN GRANTING THE APPELLEES' MOTION FOR SUMMARY JUDGMENT AND DISMISSING THE CASE AGAINST APPELLEES."

{¶ 32} "Civ. R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, 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. (Internal citations omitted). Our review of the trial court's decision to grant summary judgment is de novo." *Cohen v. G/C Contracting Corp.,* Greene App. No. 2006 CA 102, 2007-Ohio-4888.

"A. The Trial Court Erred in Finding that Appellees Were Not Liable for the Trespass of Others."

{¶ 33} The trial court determined that Appellees established that none of them trespassed on Duer's property or caused third parties to do so, and that Duer did not rebut Appellees' evidence.

{¶ 34} According to Duer, a trier of fact could conclude that "Appellees were aware that the 'Staley story' they wrote and published would lead to their readers trespassing" on the Staley

property. "Further, a trier of fact could find that the book, which holds itself out as a travel guide, encouraged or advised readers to visit the locations listed in the book."

{¶ 35} "A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, * * * caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser. (Citations omitted). The determination of a trespasser's liability for claimed damages thus turns on whether any act or omission of the trespasser caused the damages claimed." *Markey v. Barrett* (March 8, 1996), Montgomery App. No. 15243. One may also be liable for trespass if he or she causes a thing or third person to intentionally enter land in possession of another. *Baker v. Shymkiv* (1983), 6 Ohio St.3d 151,153 (citing Restatement of Torts 2d 277, Section 158.)

{¶ 36} Having reviewed the record, we conclude that the trial court correctly found that no genuine issue of material fact existed as to Duer's claim for trespass to land. The title page of *Weird Ohio* provides as follows: "*Weird Ohio* is intended as entertainment to present a historical record of local legends, folklore, and sites throughout Ohio. Many of these legends and stories cannot be independently confirmed or corroborated, and authors and publisher make no representation as to their factual accuracy. *The reader should be advised that many of the sites described in Weird Ohio are located on private property and should not be visited, or you may face prosecution for trespassing."* (Emphasis added).

{¶ 37} In her Reply brief, Duer asserts that "Appellees point to the table of contents [with the above disclaimer], which has never been introduced as evidence in this matter." We note, however, that the page containing the disclaimer was identified by Moran in his deposition as a

true and accurate copy of the book's title page.

{¶ 38} While Duer asserts that readers of *Weird Ohio* "are encouraged to visit the website" forgottenohio, the only mention in the book of the website that is part of the record before us is not a directive to readers but merely states, "Since 1999, [Andrew Henderson] has run the popular Web site *Forgotten Ohio*, and his first book, *Forgotten Columbus*, was published in 2002."

{¶ 39} Most importantly, Appellees deposed nine of the alleged trespassers identified by Duer, and none of them were familiar with *Weird Ohio* when they visited the property. One deponent, Jacob Jones, provided a written statement that he "researched 'haunted places near Springfield, Ohio' on google.com and found the * * * web page from forgottenoh.com which gave me enough information to further search on google .com for directions to the location which I used to visit the Staley Mill." Jones was the only deponent who indicated any familiarity with the website, and he testified at deposition that he had not read *Weird Ohio*.

{¶ 40} As the trial court determined, there is no evidence that Appellees caused any third parties to trespass on the Staley property. There being no genuine issue of material fact, the trial court correctly granted summary judgment on this claim.

"B. The Trial Court Erred in Finding that Appellees Did not Aid and Abet Others in Carrying Out Tortious [sic] Acts on Appellant's Property."

{¶ 41} The trial court determined that Appellees produced unrebutted evidence that they did not "substantially induce or incite or encourage anyone to carry out a tortuous act on [Duer's] property."

{¶ 42} According to Duer, although "Appellees were not present when readers of the book *Weird Ohio* trespassed on the property of Appellants, they provided the means and

encouragement for the readers to trespass and gave trespassers enough information to find the locations of Appellants' property."

{¶ 43} "In *Aetna Casualty and Surety Co. v. Leahey Construction Co., Inc.* (6th Cir. 2000), 219 F.3d 519, the court found that under Ohio law a tort of civil aiding and abetting, as set forth by the Restatement (Second) of Torts, is a viable cause of action. *Id.* at 532-533. In a civil aiding and abetting case, a plaintiff must show 'two elements: (1) knowledge that the primary party's conduct is a breach of duty and (2) substantial assistance or encouragement to the primary party in carrying out the tortuous act.'" *Kimble Mixer Co. V. Hall*, Tuscarawas App. No. 2003 AP 01 0003, 2005-Ohio-794, ¶ 45 (citation omitted).

{¶ 44} There is no evidence in the record that Appellees encouraged or provided substantial assistance to anyone to trespass upon Duer's property; *Weird Ohio* expressly advises its readers that they may face prosecution for trespassing, and none of the deponents had read the book when they visited the property. There being no genuine issue of material fact, the trial court properly granted summary judgment in favor of Appellees on Duer's civil aiding and abetting claim.

"C. The Trial Court Erred in Finding that Appellee's Actions Did Not Place Appellants in a False Light."

{¶ 45} Duer asserts that the story in *Weird Ohio,* though "presented as true, * * * is a highly fictionalized and shocking depiction of the history of Appellant Duer's family. It offensively implies that Appellant Duer is not the direct decedent [sic] of Elias Staley and that she is the decedent [sic] of a mass murderer."

{¶ 46} "In Ohio, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his

privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451,¶ 61. Further, torts of invasion of privacy are personal and must be brought by "'a living individual whose privacy has been invaded.'" *Rothstein v. Montefiore Homes*, (Dec. 23, 1996), 116 Ohio App.3d 775, quoting Restatement of the Law 2d, Torts (1977), Section 6521.

{¶ 47} We note that the trial court dismissed the false light cause of action as to the trusts and the estate, sustaining it only as to Duer individually. There is no mention of Duer in *Weird Ohio,* as the trial court noted, but only of Elias, David, Andrew and "Old Man Staley." Regarding her ancestors, Duer testified as follows:

{¶ 48} "Q. * * * The second portion of the story there, who's the character that commits the heinous axing of people? Who's the character that does that?

{¶ 49} "A. Old Man Staley.

{¶ 50} "Q. * * * Does it identify who Old Man Staley is?

{¶ 51} "A. It doesn't need to. It already explained who he was.

{¶ 52} "Q. * * * Who is Old Man Staley?

{¶ 53} "A. According to the book and the inferences, it would be Andrew.

{¶ 54} * *

{¶ 55} "A. Or possibly Elias or David.

{¶ 56} "Q. * * * So it could be any of those three?

{¶ 57} "A. Uh-huh.

{¶ 58} “Q. But we don’t know who, correct?

{¶ 59} “A. No. It was meant to be that way.”

{¶ 60} Duer has no cause of action for invasion of her privacy where the statements at issue do not concern Duer herself. *Rothstein*. In other words, Duer’s privacy has not been invaded. Finally, as Appellees assert, the book’s disclaimer, asserting that “the authors and publisher make no representation as to [the] factual accuracy” of the “legends” and “stories” contained in the book undermines Duer’s argument that the story constitutes a false statement of fact. There being no genuine issue of material fact, the trial court properly granted summary judgment on this claim.

“D. The Trial Court Erred in Finding That Appellees Did Not Intentionally Cause Emotional District [sic] to Appellants.”

{¶ 61} The trial court determined that Appellees presented evidence that “they never intended to cause emotional distress * * * nor was the article about the property in question so extreme and outrageous so as to go beyond all bounds of decency.”

{¶ 62} Duer argues that Appellees “published the book without notifying the owners of properties and without attempting to verify the stories or seek permission to publish them. A trier of fact could find this is extreme and outrageous behavior.”

{¶ 63} A claim of intentional infliction of emotional distress “requires proof of extreme and outrageous conduct of an intentional or reckless character. *Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen & Helpers of America* (1983), 6 Ohio St.3d 369 * * * . For that purpose, a claimant must prove that ‘the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’ Id., at 375 * * * quoting

Restatement of the Law 2d, Torts (1965), 73, § 46." *Dunina v. Stemple*, Montgomery App. No. 21992, 2008-Ohio-2064, ¶ 13.

{¶ 64} The Appellees did not create the story at issue. For example, Wilson Jones testified that he had heard "35 years ago roughly" that the Staley property was haunted. Duer acknowledged in her deposition that versions of the Staley property story appeared on other websites in addition to the one at issue herein. *Weird Ohio* contains a disclaimer asserting that it is "intended as entertainment," and it expressly makes no representation as to the factual accuracy of the stories. As determined above, there is nothing in *Weird Ohio* that encourages its readers to trespass on Duer's property, and Duer is not mentioned in the book. Since Appellees' conduct is not "atrocious, and utterly intolerable in a civilized society," the trial court properly granted summary judgment in favor of Appellees on this claim.

{¶ 65} Since there are no genuine issues of material fact regarding the above claims, Duer's second assignment of error is overruled.

{¶ 66} Duer's third assignment of error, including subparts, is as follows:

{¶ 67} "THE TRIAL COURT ERRED IN GRANTING APPELLEES' MOTION TO DISMISS APPELLANTS' CLAIMS FOR INCITEMENT TO IMMINENT LAWLESS ACTION, INVASION OF PRIVACY (FALSE LIGHT) AS AGAINST THE CHALMER S. STALEY TRUST, INVASION OF PRIVACY - UNREASONABLE PUBLICITY OR WRONGFUL INTRUSION INTO THE APPELLANTS' PRIVATE ACTIVITIES, AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; AS APPELLANTS' COMPLAINT HAD ALLEGED SUFFICIENT FACTS TO STATE THEIR CLAIMS FOR RELIEF UNDER OHIO LAW."

{¶ 68} "An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. (Citation omitted). In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint." (Citation omitted). *Perrysburg Township v. City of Rossford*, 103 Ohio St.3d 70, 2004-Ohio-4362, ¶ 5.

"A. The trial court should not have dismissed Appellants' claims for incitement to imminent lawless action as Appellants' complaint had alleged sufficient facts to state their claim for relief under Ohio law."

{¶ 69} The trial court determined that the tort of "incitement to imminent lawless action" is not recognized in Ohio, and that R.C. 2307.60 does not create a separate cause of action for damages.

{¶ 70} According to Duer, her "complaint alleges that the Appellees' speech was intended to produce, was likely to produce, and did produce imminent disorder, which proximately caused the Appellants' damages to their property and emotional damages." Duer further argues that under R.C. 2307.60(A), she can "recover * * * damages in a civil action since they have alleged that they have been damaged in person or property by the Appellees."

{¶ 71} We initially note that the allegations in Duer's complaint for this claim are primarily focused on the website. According to the complaint, "[t]he Defendants used words to carry out their illegal purpose of providing information for the purposes of assisting readers of the website and of the book in committing crimes, including but not limited to the crime of incitement to violence (R.C. 2917.01)."

{¶ 72} While R.C. 2917.01 criminalizes "inciting to violence," we agree with the trial court that Ohio does not recognize the civil tort of "incitement to imminent lawless action," and Duer has provided no authority to the contrary. We have previously determined that R.C.

2307.60 is a jurisdictional statute permitting a court to grant relief to individuals injured by a crime. *Collins v. Nat'l City Bank*, Montgomery App. No. 19884, 2003-Ohio-6893, ¶ 46. The statute has no application to Duer's claim. Accordingly, the trial court properly granted Appellees' motion to dismiss this claim.

> "B. The trial court should not have dismissed Appellants' claims for invasion of privacy (false light) as against the Chalmer S. Staley Trust as Appellants' complaint had alleged sufficient facts to state their claims for relief under Ohio law."

{¶ 73} The trial court determined that "an action for invasion of privacy compensates the victim for mental suffering, shame or humiliation. Since an estate (or a trust) is not a living person, it cannot suffer such damages," citing *Rothstein*, at 778.

{¶ 74} Duer directs our attention to paragraph 67 in her Complaint, which provides, "Defendants, individually, and as writers, publishers, or editors of the Weird Ohio Book and [forgottenohio] made false statements about Plaintiff Melissa Duer, individually and in her capacity as trustee of the Chalmer S.Staley Trust."

{¶ 75} The trial court correctly determined that a trust cannot maintain an action for invasion of privacy. *Rothstein*, at 778, citing *Lambert v. Garlo* (Jan.22, 1985), 19 Ohio App.3d 295; *Leach v. Shapiro* (May 2, 1984), 13 Ohio App.3d 393; *Arnold v. Am. Nat'l. Red Cross* (March 14, 1994), 93 Ohio App.3d 564; Restatement of the Law 2d, Torts (1997), Section 652(I). Accordingly, the trial court correctly dismissed Duer's claim on behalf of the Chalmer S. Staley Trust.

> "C. The trial court should not have dismissed Appellants' claims for invasion of privacy - unreasonable publicity or wrongful intrusion into the Appellants' private activities as Appellants' complaint had alleged sufficient facts to state their claims for relief under Ohio law."

{¶ 76} The trial court determined that Duer is not individually mentioned in any of the materials at issue, and the materials do not indicate that she is a descendant of "Old Man Staley." The court further noted that "exploitation or disclosure of the private affairs giving rise to the claim must be those of the complaining party herself," again citing *Rothstein*.

{¶ 77} The court continued, "There has been no exploitation of the private affairs of Melissa Duer, * * * .

{¶ 78} "To wrongfully intrude into the private affairs of Melissa Duer, the articles or statements must connect her name or identity to the disclosure."

{¶ 79} Duer asserts, "Appellants have sufficiently alleged a cause of action for wrongful intrusion, since they have alleged that Appellees have wrongfully intruded into their private activities by publishing false stories concerning the Appellant's family history and concerning the property owned by Appellants."

{¶ 80} We initially note, Duer's Complaint delineates this cause of action as follows: "Invasion of Privacy (Unreasonable Publicity Given to the Other's Private Life or Appropriation of the Plaintiffs' Name or Likeness.)" According to the claim for relief, "The Defendants intentionally intruded, physically or otherwise, upon the solitude or seclusion of the Plaintiffs in their private affairs or concerns. * * * The heritage and descendency of Plaintiff Duer is a private matter. * * * The Defendants * * * intentionally, and maliciously appropriated or exploited the private affairs of [Duer]."

{¶ 81} The tort of invasion of privacy is divided into four separate torts, including:

{¶ 82} "'(1) intrusion upon the plaintiff's seclusion or solitude, or his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the

plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.'" (citation omitted). *Scroggins v. Bill Furst Florist and Greenhouse, Inc.,* Montgomery App. No. 19519, 2004-Ohio-79, ¶ 33.

{¶ 83} It is unclear exactly which tort Duer is asserting, in that she claims intrusion upon her solitude and seclusion and unreasonable publicity into her private matters, as well as appropriation of her likeness in her complaint. However, as the trial court concluded, there is no mention of Duer in *Weird Ohio*, and there is no way to infer from the story about Staley Road that Duer and "Old Man Staley" are related. For the foregoing reasons, the trial court properly granted Appellees' motion to dismiss this claim.

> "D. The trial court should not have dismissed Appellants' claims for negligent infliction of emotional distress as Appellants' complaint had alleged sufficient facts to state their claims for relief under Ohio law."

{¶ 84} According to Duer's Complaint, "Defendants' actions have placed Plaintiff Melissa Duer and Carol M. Mumford in peril of serious physical injury by the fact that Plaintiffs have been subjected to trespassers damaging their property, including committing arson on Plaintiffs' property and buildings." Duer asserted that the resulting emotional distress was reasonably foreseeable.

{¶ 85} The trial court determined, Duer's "complaint misses the objective component that the Plaintiff must have actually witnessed this dangerous accident or been in actual physical peril (i.e., danger of being injured). Subjective claims do not create the cause of action."

{¶ 86} According to Duer, "Appellants have alleged that they have been in the zone of danger," in reliance upon *Paugh v. Hanks* (1983), 6 Ohio St.3d 72.

{¶ 87} "The availability of a claim for relief for negligent infliction of emotional distress

was first recognized in Ohio in [*Paugh*]. In that case, serious emotional distress was allegedly suffered by a parent who feared her children were in peril when automobiles accidently left the road and collided into her home. The issue was whether the emotional distress the parent allegedly suffered was reasonably foreseeable to the drivers, when the parent suffered no physical harm.

{¶ 88} "Cases in which claims for relief for negligent infliction of emotional distress have been held to lie have, like *Paugh v. Hanks*, involved distress suffered by a bystander who witnessed a sudden and shocking event, such as an auto accident, that did or reasonably could result in injury to other persons. We have held that one who witnesses the negligent damaging of his property over a period of time arising out of the ongoing negligence of the defendant may not recover for emotional distress experienced as a result." *Potter v. RETS Tech Center*, Montgomery App. Nos. 22012, 22014, 2008-Ohio-993, ¶ 39-40.

{¶ 89} The facts set forth in Duer's Complaint, if taken as true, do not establish that she was in a foreseeable zone of danger, but only that her property was repeatedly damaged as a result of the negligence of the Appellees. Accordingly, the trial court correctly granted Appellees' motion to dismiss this claim.

{¶ 90} Finally, Appellees assert that the protections of the First Amendment bar Duer's claims. Appellees asserted the same argument in their Reply to Duer's opposition to their motion to dismiss. The trial court did not address the constitutional issue, and having concluded that the trial court properly granted Appellees' motion to dismiss the above claims on the merits, we need not address this argument.

{¶ 91} There being no merit to Duer's third assignment of error, it is overruled.

{¶ 92} Duer's final assignment of error is as follows:

{¶ 93} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT, AS DISCOVERY WAS ONGOING, THE MOTION WAS TIMELY AND WOULD NOT HAVE RESULTED IN ANY PREJUDICE TO APPELLEES OR DELAY IN BRINGING THE MATTER TO TRIAL AND SUCH A FINDING WAS AN ABUSE OF DISCRETION."

{¶ 94} The trial court's decision overruling Duer's motion for leave to amend provides in part:

{¶ 95} "No explanation has been provided as to why * * * new causes of action could not have been discovered long ago (if they are even viable) and presented to the Court.

{¶ 96} "The Plaintiffs have also alleged and attached copies of police reports indicating, the Plaintiffs argue, 'over a hundred reports of trespassing.'

{¶ 97} "The Court has reviewed the attached pages, all of which were multi-page readouts of each incident.

{¶ 98} "There were 10 reports called in during 2006.

{¶ 99} "There were 12 reports called in during 2007.

{¶ 100} "In 2008, the same year this complaint was filed for record, the 911 complaints curiously jumped to 52

{¶ 101} "Upon closer examination of the 911 logs, it is clear that these reports were not just about trespassers on Plaintiffs' property.

{¶ 102} "Had the Plaintiffs looked closer, they would have determined (and hopefully not wasted the Court's time) that the complaints called in include claims of excessive

cars driving down the road; cars parked on the road; claims of deer hunters; wires down on property; vehicle driving through yard; five of the reports were actually sheriff department generated wherein they staked an unmarked cruiser on the road between 11 p.m. and 2 a.m. to address all the claims being filed with 911 (apparently they discovered nothing). The reports also contained claims of juveniles on bicycles on the road, farm equipment hitting the mailbox and even a complaint against Mr. Duer for pointing a pistol at a juvenile female driver who was stopped on the roadway.

{¶ 103} "The Plaintiffs' claims of over a hundred reports of trespassing is, in contract parlance, puffing, and a waste of the Court's time."

{¶ 104} "Civ.R. 15(A) indicates that leave of court shall be 'freely given' for amendment of pleadings. 'The grant or denial of leave to amend a pleading is discretionary and will not be reversed absent an abuse of discretion. * * *' Furthermore, while Civ.R.15 allows for liberal amendment, courts may deny motions to amend when there is a showing of bad faith, undue delay, or undue prejudice to the opposing party." (Citation omitted). *Englewood v. Turner*, 178 Ohio App.3d 179, 2008-Ohio-4637, ¶ 49.

{¶ 105} Duer filed her motion for leave to amend on February 17, 2009, one month before trial, and over a year after her refiling her complaint, and 31 months after filing the initial complaint. According to Duer, she learned, in the course of Willis' deposition, taken January 20, 2009, near the close of discovery, that Willis "holds himself out as an individual with the ability to investigate and determine whether a location may be haunted," but Willis failed to investigate "whether or not any of the properties included in the book as haunted were in fact haunted." Duer also learned from Willis that "he and presumably the other authors of *Weird*

Ohio were approached by Defendants Sterling Publishing, Inc., Mark Sceurman and Mark Moran to write the book and were paid on a per section basis, with input and stories being supplied by Defendants Sterling Publishing, Inc., Sceurman and Moran. * * * Defendants Sterling Publishing Inc., Sceurman and Moran knew or should have known that the *Weird Ohio* book would * * * cause trespassing on the properties listed and that Defendants Willis Henderson and Moran were dangerous or unfit persons to author the book." In the amended complaint attached to her motion, Duer sought to add claims of negligent hiring, supervision and retention, civil conspiracy, respondeat superior/ agency by estoppel, negligence, and injunctive relief.

{¶ 106} As the trial court noted, Duer provided no explanation for the delay in seeking to add the new causes of action. Further, Duer failed to identify any new material facts giving rise to the new claims, and her assertion regarding the relationships between Appellees is speculative. Duer also incorrectly asserted that the parties were still in the process of discovery when she sought leave to amend; the discovery cutoff of February 6th had passed. Despite ten months for discovery, Duer conducted only two depositions, requesting the deposition of Moran one week before the close of discovery. Such inaction and delay casts doubt on Duer's good faith, as Appellees assert. Finally, discovery having closed, the parties were preparing for trial, and "the necessity of additional motions or answers" would have prejudiced Appellees. *Schweizer v. Riverside Methodist Hospital* (1996), 108 Ohio App.3d 539, 546. Accordingly, the trial court did not abuse its discretion in overruling Duer's motion for leave to amend the complaint. Duer's fourth assignment of error is overruled.

{¶ 107} The judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

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