RECENT CASES

Copyright infringement claim against author of "Driving Miss Daisy" is dismissed

A Federal District Court in New York has granted summary judgment to Alfred Uhry, the author of the play and screenplay of "Driving Miss Daisy," and to other parties involved in the production and distribution of the play and film, in a copyright infringement action brought by Henry Denker, the author of the novel "Horowitz and Mrs. Washington."

As described by Judge Michael B. Mukasey, Denker's novel portrayed the relationship between "Samuel Horowitz, a crusty, bigoted, 72-year-old Jewish man and Harriet Washington, his black physical therapist." In Denker's play based on the novel, the action occurs in

New York City during July 1977. The action in the novel takes place over a few months in the late 1970s, during which time Horowitz recovers from a stroke and befriends Mrs. Washington. Uhry's work related the story of Daisy Werthan, an elderly, Jewish woman, and her twenty-five year relationship with Hoke Coleburn, her black chauffeur. The play was set in Atlanta between 1948 and 1973, and was a "distinctively southern story."

Judge Mukasey noted that for purposes of the motion for summary judgment, the Uhry parties conceded ownership and actual copying. The element at issue was the improper appropriation of copyrightable material - the appropriation of "the economic value of the work as measured by the work's appeal to the public." Uhry was required to establish that the works were substantially similar, from the point of view of the lay reader, and that the similarities involved copyrightable material.

Uhry introduced expert testimony concerning the similarities between the two works, but the court stated that such testimony was irrelevant because, with respect to the issue of improper appropriation, substantial similarity is judged by "the spontaneous response of the ordinary lay observer."

Judge Mukasey then observed that both works were about "an elderly, white Jewish person, who, in the face of advancing age and resulting loss of independence, requires the assistance of a black helper, and after initial resistance, develops a friendship with the helper." Beyond this level of abstraction, stated the court, the works were "markedly dissimilar," particularly with respect to setting, time period, and the expression of the theme of racism.

The works also differed in total concept and feel, declared Judge Mukasey. Denker's work was primarily a comedy, while Driving Miss Daisy was "more of a poignant and sentimental work."

The other purported similarities between the works either involved unprotected scenes a faire or were not similarities at all, stated the court. In both works, the helper demonstrates loyalty by traveling to work at some personal risk, but it was noted that generalized plot devices, such as instances of misfortune befalling the elderly or demonstrations of dedication by a servant or helper, are not entitled to copyright protection.

Remaining similarities alleged by Denker involved scenes a faire - incidents or events that necessarily follow from a common theme or setting - and did not provide the basis of an infringement action.

Judge Mukasey determined that, based on the above-discussed differences, no reasonable juror could find the works substantially similar, and that summary judgment was warranted on the issue of Uhry's alleged improper appropriation of the work as a whole.

The court then rejected Denker's claim that the characters in Driving Miss Daisy were substantially similar to the characters in Horowitz and Mrs. Washington. Daisy and Horowitz shared certain traits, but those shared traits were expressed in different ways, stated Judge Mukasey, who continued by observing that "Daisy, reserved and unemotional, and Horowitz, combative and comedic, are by no means substantially similar." The alleged similarities between other characters in the works were found to be only broad, unprotectible character outlines. In all, summary judgment also was available to Uhry on the issue of the infringement of characters.

Denker v. Uhry, 1992 U.S. Dist. LEXIS 18630 (S.D.N.Y. 1992) [ELR 14:12:3]

Court dismisses New York Civil Rights Law claim against producers of the film "Sea of Love"

The title sequence of the film "Sea of Love" presented a series of night scenes in New York City; one scene depicted two prostitutes soliciting along a row of cars. Pamela Preston claimed that she was one of the individuals depicted as a prostitute and sued Martin Bregman Productions and other parties under New York's Civil Rights Law, and also set forth claims for conversion and intentional infliction of emotional distress.

The Bregman parties disputed whether the woman shown in the challenged scene was Preston but conceded her identity for the purpose of a motion for summary judgment. The approximately nine second segment was taken from a moving vehicle in low light; the woman's face was visible for about 4 1/2 seconds.

Federal District Court Judge Louis L. Stanton granted the Bregman parties' motion for summary judgment dismissing the complaint. The court stated that Preston's appearance was incidental, both with respect to screen time and to the film's story line, and that the statute required "a more direct and substantial connection between the appearance of [a party's] name or likeness and the main purpose and subject of the work."

It was found that the conversion claim was, in law, a privacy claim since it was based on the purported commercial use of Preston's image without her consent; the claim did not exist, observed Judge Stanton, other than under the Civil Rights Law. And any intangible property right that Preston might have in her image would be incapable of being "converted" under New York law.

The court concluded the mere publication of private, personal facts would not amount to a claim for intentional infliction of emotional distress.

Preston v. Martin Bregman Productions, Inc., 1991 U.S.Dist. LEXIS 7245 [ELR 14:12:3]

Court grants summary judgment to author and publisher of "The Mambo Kings Play Songs of Love" in libel action brought by female band leader

Gloria Parker led an all-female rumba band in the 1940s and 1950s under the name "Glorious Gloria Parker." In "The Mambo Kings Play Songs of Love," a novel written by Oscar Hijuelos and published by Farrar, Straus & Giroux, the author included the name "Glorious Gloria Parker" as a "peripheral true-life character."

Parker sued Hijuelos, his publisher and other parties for libel and invasion of privacy.

Chief Federal District Court Judge Thomas C. Platt first observed that it was difficult to believe that an average reader would consider either of the two challenged passages defamatory - "reporting that a person has requested a kiss or has 'sipped' a daiquiri, true or not, simply does not subject them to the scorn of the average reader..." It was noted that the average reader standard was based on contemporary public opinion at the time the book was published in 1989, and not at the time when the incidents supposedly took place. And the negative inference of an allegedly libelous statement must be recognized by a substantial portion of the community; a claim will not lie if an individual suffers some injury to his or her reputation among a particular constituency or localized community, stated the court.

Parker also alleged that the novel's book jacket displayed a woman who resembled an advertisement for the band leader's appearance at an upstate New York theater. Farrar Straus and the designer of the book jacket stated that the image was a photograph of a woman named Vann Vore which appeared on the cover of an album entitled "Mambo Jamboree." Judge Platt declared that the image on the book cover was not a "recognizable likeness" required to state a claim under section 51 of the New York Civil Rights Law.

The court concluded that the use of Parker's name was not actionable because such use was incidental to the novel as a whole; dismissed Parker's libel claim against the National Endowment for the Arts arising from the agency's alleged involvement in funding Hijuelos during the period when he was writing the novel; and granted the Hijuelos parties' motion for summary judgment.

Parker v. Hijuelos, 1991 U.S.Dist. LEXIS 11331 [ELR 14:12:4]

Tolkien's "The Lord of The Rings" is protected by United States Copyright Act although initially published without copyright notice

Eisen, Durwood & Company is a book packaging firm specializing in arranging for new editions of previously published material. The company sought a declaration that any United States copyright on J.R.R. Tolkien's three-part novel "The Lord of the Rings" was invalid, that the original edition of the work was in the public domain and that Eisen, Durwood would not infringe any United States copyrights by publishing the work.

A Federal District Court in New York has ruled that the Tolkien copyright was valid, and granted a motion for summary judgment brought by Tolkien's executor and other parties.

Judge Vincent L. Broderick noted that The Lord of the Rings was published in Great Britain in 1952. In 1954, the publisher, George Allen & Unwin, granted Houghton Mifflin a license to publish the work in the United States. The company received temporary five-year copyright protection pursuant to section 22 of the Copyright Act of 1909. Section 22 did not refer to any requirement concerning the inclusion of a copyright notice on the works to which the provision applied.

In 1955, the Universal Copyright Convention came into force for the United States. Great Britain already had adhered to the Convention. The effect of the Convention was that The Lord of the Rings, under the Copyright Act, became entitled to copyright protection in the United States without complying with various formalities, including that of printing a copyright notice.

In 1982, copyrights on the work were issued under the 1976 statute, according to the court.

Eisen, Durwood argued that during the years when the extension of the temporary copyright constituted the only United States protection of the work, many British-published copies of The Lord of The Rings were distributed, without a copyright notice, in the United States, and that such conduct constituted a forfeiture of copyright protection.

Judge Broderick observed that the omission of notice under the Copyright Act of 1909 may have barred copyright holders from a waiver of certain procedural requirements, but that the statute did require the forfeiture of copyrights of aliens because of the distribution of their works without a copyright notice. The court also commented that "imposing the draconian sanction of forfeiture of the copyright for the often unintentional infraction would be certain to cause resentment abroad with adverse effects on implementation of U.S. intellectual property rights in other countries.

Eisen, Durwood & Company, Inc., 794 F.Supp. 85 (S.D.N.Y. 1992) [ELR 14:12:4]

Tax liability of general partners arising from services provided to film production limited partnerships is upheld

As reported at ELR 13:6:17, the Commissioner of Internal Revenue determined that Russell S. Doughten, Jr., Gertrude S. Doughten and the corporations Mark IV Pictures, Inc. and Heartland Productions, Inc. were liable for federal income tax deficiencies for the years 1979 through 1982. The United States Tax Court upheld the determination and a Federal Court of Appeals has affirmed the Tax Court decision.

The Doughten parties, who were involved in forming limited partnerships for the purpose of producing, distributing and exhibiting films with religious themes, argued that the general partners had assigned film rights and good will to their respective limited partnerships in exchange for general partnership interests, and that no gain or loss was recognized to the partnerships, or to any of its partners.

The Commissioner ruled that the Doughtens received partnership interests in exchange for performing services rather than giving property, and that the fair market value of those interests constituted income in the years 1980, 1981 and 1982.

Federal Court of Appeals Judge John R. Gibson noted that once the various limited partnerships were operating, the general partners assigned their film rights to their respective partnerships - "they did not place dollar values on their original story ideas and scripts, and conducted no arm's-length negotiations." The limited partnerships also paid the general partners for services rendered in producing the films. The offering circulars stated that the services were not rendered by the general partners in their general partnership capacities. However, there was no written contract between the general partners and limited partnerships governing the film productions, and the amounts paid by the limited partnerships to the general partners, again, were not the result of arm's-length negotiations.

The limited partnerships also paid their general partners for arranging the exhibition and distribution of the films.

Judge Gibson stated that under 26 U.S.C.721, no income is recognized when a taxpayer exchanges property for a partnership interest. When a taxpayer exchanges services for a partnership interest, he/she must include the fair market value of that interest in gross income. The tax court did not clearly err in finding that the partners did not prove that they received their interests in exchange for services rather than property.

It also was found that the partners received capital interests because they had "the right to receive" shares of the limited partnerships' assets in a "hypothetical winding up of the partnerships."

Judge Gibson concluded that the tax court did not err in determining the fair market value of the interests to be included in each partner's gross income.

Mark IV Pictures,Inc. v. Commissioner of Internal Revenue, 969 F.2d 669 (8th Cir. 1992) [ELR 14:12:5]

Declaratory judgment action brought by National Hockey League against NHL Players Association is dismissed for lack of subject matter jurisdiction

A Federal District Court in Minnesota has dismissed, for lack of subject matter jurisdiction, a declaratory judgment action brought by the National Hockey League against the National Hockey League Players Association and a "putative defendant class of hockey players."

The league and its member clubs sought a declaration that their continued adherence to certain terms of the parties' 1988 Collective Bargaining Agreement was protected from antitrust challenge under the non-statutory labor exemption, as defined in Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), cert denied, 111 S.Ct. 711 (1991). One of the league's goals, according to Judge Rosenbaum, was to preserve the "equalization rules" - the "reserve clause" of professional hockey.

The association claimed that it was not a proper party to the action and that there was no actual controversy between the league and the putative defendant class.

In finding that the league's action against the association lacked an independent basis for subject matter jurisdiction and that there was no justiciable controversy involving any named players or the putative class, the court first reviewed the league's equalization rules. The rules require that any league club contracting to acquire a free agent player provide an "equalization payment" to the free agent's former club. The payment may be in the form of player contract assignments, draft pick assignments, or a cash payment. The member clubs involved must mutually agree on the payment; if they do not agree within three days of the free agent's acquisition, the matter must be submitted to binding arbitration.

In May 1991, the players association sent the league a "Notice of Termination and Proposed Revision of Agreement." The association stated that once the notice was given, the 1988 agreement expired in September 1991. The league argued that a full-text proposed revision did not accompany the notice, and that the notice therefore did not serve to terminate the contract.

Although the parties continued to bargain, no new agreement was reached and on April 1, 1992, the hockey players went on strike.

Judge Rosenbaum first found that the players association would lack standing to bring an antitrust action to challenge the league's equalization rules. If antitrust injury existed as a result of the equalization rules, it would be the players, not their collective bargaining representative, who would suffer the economic effects, stated the court. Any damage to the association would be considered speculative, and would likely duplicate any recovery by individual players. Given the player association's lack of standing to bring a coercive antitrust action, the court lacked subject matter jurisdiction to hear a declaratory judgment action against the association.

Furthermore, the putative defendants presented affidavits stating their lack of intention to bring an antitrust action and lack of interest in becoming class representatives. In light of the affidavits, the court declined to find that the league demonstrated "a concrete dispute of sufficient immediacy to provide subject matter jurisdiction.." and dismissed the league's action against the seven named defendants and the putative class of defendant players.

National Hockey League v. National Hockey League Players Association, 789 F.Supp. 288 (D.Minn. 1992) [ELR 14:12:5]

Nevada statute regulating NCAA investigation and hearing procedures is ruled unconstitutional

In December 1990, the National Collegiate Athletic Association sent a notice of official inquiry to the University of Nevada Las Vegas describing possible rule violations. The NCAA staff and the university conducted separate investigations of the school's intercollegiate basketball program.

In July 1991, two university employees demanded that the NCAA abandon its existing procedure for conducting the investigation and holding the official hearing. The employees, joined by Jerry Tarkanian and other parties, stated that the NCAA was required to conduct the investigation and hearing according to the provisions of a Nevada statute enacted in April 1991. The statute imposed certain minimum "due process" procedural standards on the NCAA when the association investigates a Nevada NCAA member institution.

The university parties demanded, among other requests, document production prior to the prehearing conference; the opportunity to confront all witnesses; the production of all exculpatory statements obtained by the NCAA; the selection of an independent and impartial entity to adjudicate the facts; and a public hearing.

The NCAA stated that complying with the university parties' requests would violate the substantive and procedural rules applicable to all NCAA member institutions, and filed a lawsuit for declaratory and injunctive relief.

A Federal District Court in Nevada first determined that the court was not required to abstain from considering the federal constitutional questions raised by the NCAA. Judge Howard McKibben then found that "the national scope of the NCAA's activities are sufficient to establish the requisite interstate involvement under the Commerce Clause." It was further found that the statute was not per se invalid under the Commerce Clause.

However, the statute required procedures which were "both substantially different from those contained in the NCAA bylaws and significantly burdensome on the NCAA's objective of maintaining a 'level playing field' within intercollegiate athletics." The court cited the provision of the statute barring the NCAA from expelling its Nevada institutions if those institutions refused to comply with the provisions of the bylaws and constitution of the NCAA which might conflict with the statute. Such a provision, and similar provisions in other states, "would strip the NCAA of the authority to freely adopt its own procedural regulations," noted the court.

Judge McKibben also observed the substantial extraterritorial effect of the Nevada statute. By severely restricting the NCAA from establishing uniform rules to govern and enforce interstate collegiate practices, the statute would allow the Nevada legislature to effectively dictate enforcement proceedings in states other than

Nevada. In all, applying the challenged provisions of the statute to the pending infractions case would violate the Commerce Clause, declared the court.

The court proceeded to find that the statute also would impair existing contractual relations between the NCAA and the Nevada member institutions in violation of the Contract Clause of Article I, Section 10 of the United States Constitution. Judge McKibben stated that the NCAA and the Nevada NCAA member institutions had a contractual relationship sufficient to trigger review under the Contract Clause; that the provisions of the Nevada statute substantially impaired said contractual relationship; and that the state did not demonstrate that the statute was necessary to achieve a valid state interest. The statute therefore unconstitutionally impaired the contractual relationship existing between the NCAA and its Nevada member institutions, and the court restrained the university parties from taking any action to enforce or seek protection under the provisions of the statute.

National Collegiate Athletic Association v. Miller, 795 F.Supp. 1476 (D.Nev. 1992) [ELR 14:12:6]

Basketball coach obtains summary judgment in dispute involving tape recorded conversation with student athlete

Deon Thomas was a student at the University of Illinois and a member of the school's men's basketball team. Bruce Pearl, an assistant basketball coach at the University of Iowa tried to recruit Thomas to attend that school. As described by Federal District Court Judge Harold Albert Baker, Pearl spoke with Thomas on the telephone and recorded their conversation. Thomas did not know that Pearl was recording the conversation and did not consent to the recording.

Pearl disclosed the tapes of his conversation with Thomas to the National Collegiate Athletic Association, and, according to Thomas, also disclosed them to officials at the University of Illinois. The NCAA, on the basis of the tape recorded conversation, conducted an investigation of recruiting violations on the part of the University of Illinois.

Thomas sued Pearl in state court alleging the violation of the Illinois Eavesdropping Statute and the federal wiretapping statute found in the Omnibus Crime Control and Safe Streets Act of 1968. Pearl removed the lawsuit to the Federal District Court.

The court, in granting Pearl's motion for summary judgment, noted that Pearl, a party to the conversation who was acting "under color of law," met one of the exceptions to the statute. Judge Baker referred to federal civil rights statutes in attempting to define "under color of law," although observing that the phrase might mean something different in the federal wiretapping statute. Pearl made the recording while recruiting basketball players for the University of Iowa, an agency of the state of Iowa, and did so while acting within the scope of his employment and at the direction of his superiors at the school, using school-supplied equipment.

Even if Pearl was not acting "under color of law," the court found that the coach was not liable under the federal wiretapping statute because his actions were within the "consent" exception, and were not unlawful.

Judge Baker then stated that it was not necessary to decide whether the Illinois Eavesdropping Statute applied to Pearl's conduct because the Illinois Supreme Court has held that eavesdropping does not occur when the person recording the conversation is either a party to the conversation or known by the participants to the conversation to be present.

Thomas v. Pearl, 793 F.Supp. 838 (C.D.Ill. 1992) [ELR 14:12:7]

General partnership interests in horse breeding and horse racing association are not "securities"

When Thomas Holden and other parties sued Robert R. Hagopian and others alleging the violation of federal and state securities laws, a Federal District Court found that the Holden parties' partnership interests in Kentucky Thoroughbred Associates were not securities.

In affirming the District Court's decision, Federal Court of Appeals Judge Choy considered "whether, although on the face of the partnership agreement the investor theoretically retains substantial control over the investment and an ability to protect the investment from the managing partner or hired manager, the investor nonetheless can demonstrate such dependence on the promoter or on a third party that the investor was in fact unable to exercise meaningful partnership powers."

The court reviewed the documents setting out the legal responsibility and authority of the general partners to control Kentucky Thoroughbred Associates. It was noted that many partnership acts required a majority vote of the partners, including all decisions respecting partnership business; the transfer, sale, or encumbrance of partnership interests; and the compensation of a partner for work on behalf of the partnership.

Hagopian was the Administrative Coordinator of the partnership, but was contractually limited to clerical and ministerial tasks, and was subject to dismissal at any time during his five year contract for any or no reason.

The powers and duties of the general partners under the Kentucky Thoroughbred Associates arrangement provided the investors responsibility and control over the partnership's horse breeding and horse racing operations. In all, the Holden parties did not expect profits produced, in large measure, "by the essential efforts of others," the first factor in the test set forth in Williamson v. Tucker, 645 F.2d 404 (5th Cir.), cert. denied, 454 U.S. 897 (1981), a test adopted by the Ninth Circuit in Hocking v. Dubois, 885 F.2d 1449 (9th Cir. 1989), cert. denied, 454 U.S. 897 and Koch v. Hankins, 928 F.2d 1471 (9th Cir. 1991).

The second part of Williamson looks to whether the partner is so inexperienced and unknowledgeable in business affairs as to be incapable of intelligently exercising his or her partnership powers. The appropriate question, stated the court, was not whether the partners were experienced in the particular industry or area in which the partnership is engaged and in which the partners have invested, but whether the partners were inexperienced in business affairs generally. In the instant case, the evidence indicated that the investors considered themselves experienced in general business matters.

The third part of the test examined whether the partners were "so dependent on some unique entrepreneurial or management ability of the promoter or manager that...[they] cannot replace the manager of the enterprise...." The court found that the investors failed to raise an issue of fact under this standard. It was observed that the Kentucky partnership was not a pooling arrangement for the management of horses owned by the individual investor general partners; the partnership itself owned or rented the horses. Even if the management of the partnership changed, Kentucky would remain the owner or renter of the horses and the general partners would have the option of appointing a new administrative coordinator by a majority vote.

In all, the Holden parties did not establish that their general partnership interests in Kentucky Thoroughbred associates were securities entitled to protection under the 1933 and 1934 Acts.

Holden v. Hagopian, 978 F.2d 1115 (9th Cir. 1992) [ELR 14:12:7]

Cable television operator's subscriber privacy notices complied with statutory notice requirements

A Federal Court of Appeals has ruled that when Tele-Cable of Overland Park mailed two subscriber privacy notices, the notices, taken as a whole, satisfied the requirements of section 551 (a) of the Cable Communications Policy Act of 1984.

Section 551 of the statute sought to insure cable subscriber privacy by limiting a cable operator's ability to use its system to collect personally identifiable information such as the subscriber's viewing habits or the nature of transactions made by the subscriber over the cable system. The statute also limited the types of third party disclosure that can be made of information the cable company has collected, required that cable operators provide subscribers access to personally identifiable information collected by the cable operator, and required cable operators to destroy information that no longer was necessary for the purpose for which it was collected.

The statute established a set of subscriber notice requirements designed to inform subscribers of the operator's information practices that affect subscriber privacy, the subscriber's rights to limit the collection and disclosure of information, the operator's legal duties, and the subscriber's right to enforce those duties. The requirements did not themselves create a class of protected privacy interests, stated Judge Stephen H. Anderson; subscribers did not have a privacy interest in receiving a notice and the failure to provide a privacy notice would not mean that an operator's practices in any way intruded upon subscriber privacy.

TeleCable was a non-interactive "one-way" system; the system was capable only of transmitting television signals into subscriber homes. Subscribers could not send messages over the system, and the company could not receive or collect signals from subscribers. Basically TeleCable was not able to use the system to collect personally identifiable information concerning its subscribers .

TeleCable collected information furnished by its subscribers such as copies of initial work orders, the subscriber's name, address, and telephone number, the level of service, the number and location of the cable outlets, the dates of installation and disconnection, and a billing history. TeleCable's parent corporation occasionally conducted telephone market research surveys to determine subscriber satisfaction, but the company did not collect or maintain any records concerning the age, sex, race, income or political affiliation, or any other demographic data of any subscriber.

Judge Anderson, after describing TeleCable's policy with respect to the retention and destruction of subscriber information, noted that the company did not release subscriber names and addresses or other information to any third party except in connection with rendering cable service, and offered subscribers the option to be removed from the subscriber list before any disclosure is made to non-cable services. The company provided subscriber information to an independent billing firm and to independent contractors installing cable service, and authorized employees accessed subscriber data when responding to subscriber inquiries, trouble calls, complaints and orders for change in service. TeleCable claimed that it neither rented or sold its subscriber list.

When subscribers Reid Scofield and Debbie Anderson claimed that TeleCable's notices did not satisfy the requirements of section 551(a), a Federal District Court granted summary judgment to the subscribers. The subscribers alleged that TeleCable's notices did not provide subscribers with a meaningful understanding of the company's practices and thus were not sufficiently "clear and conspicuous."

Judge Anderson, after carefully considering the disclosure guidelines and TeleCable's policies, concluded that both forms of the company's privacy notices, although not "model disclosure forms," adequately satisfied the guidelines. The court cautioned, however, that TeleCable's descriptions were "dangerously close to the lowest limits of acceptable disclosure," and that the level of detail required to satisfy the guidelines would depend on the practices of particular cable operators.

Scofield v. Telecable of Overland Park, Inc., 973 F.2d 874 (10th Cir. 1992) [ELR 14:12:8]

Parents Magazine is denied injunctive relief in trademark infringement action against "Ladies' Home Journal Parent's Digest" publisher

A Federal District Court in New York has rejected a motion for a preliminary injunction sought by Gruner +

Jahr USA Publishing, the publisher of "Parents" magazine, against Meredith Corporation, the publisher of the magazine "Ladies' Home Journal Parent's Digest."

The Parent's Digest magazine, published four times a year, contains a collection of articles on child-rearing which have previously appeared in a variety of publications.

Judge Whitman Knapp described the appearance and placement of the magazine titles, and noted that although Parent's Digest included a large number of "cover lines" on the lower half of the magazine, both magazine covers are printed on glossy paper and feature a child's face. In its first issue, Parent's Digest used the caption "How They Grow" on its Table of Contents page in a manner almost identical to Parents' use of "As They Grow" to introduce articles pertaining to certain children's age groups; Parent's Digest subsequently abandoned the heading when Parents called attention to the similarity.

In conducting the inquiry as to whether there was a substantial likelihood that Meredith's use of the mark "Ladies' Home Journal Parent's Digest" would cause "an appreciable number of ordinarily prudent consumers to be misled, or simply confused, as to the source of the goods in question," Judge Knapp first found that with respect to those consumers who were advertisers, there was no possibility of confusion. Judge Knapp also found that the term "parents," used as the title of a magazine dedicated to articles on child-rearing and "addressed to person having assumed responsibility therefor," was unquestionably descriptive.

The court then determined that to the extent that Gruner + Jahr claimed the right to the use of the mere word "parents," the company's mark was extremely weak - not only was the word descriptive, but the number of synonyms of the word was limited and the word has been extensively used by third parties.

Judge Knapp agreed that Gruner + Jahr established a high degree of secondary meaning in products displaying the "Parents" logo. But the distinctiveness or "origin-indicating" quality of the mark apparently resulted from the customized manner in which the mark was displayed, not from the mere use of the word "parents."

The court referred to the fact that the only significant similarity between the magazine titles was the use of the word "parent." Parents' magazine title was printed in a stylized manner, including the distinctive feature of having the letters of the word "parents" overlap each other; the title was spread across the full cover of the magazine. Meredith's title was printed in smaller, more block-like shadowed print and consisted of several words, none of which occupied the full width of the magazine's cover.

Gruner + Jahr pointed out that Meredith used significantly smaller type to display the source-distinguishing words "Ladies' Home Journal," and used a photograph of a child on its cover in a manner similar to Parents' trade dress. But neither of these characteristics was likely to cause consumer confusion between the two products, stated the court.

Both parties' magazines were of high quality, were dedicated to articles on child-rearing, and "appealed to the same, specialized class of consumers, namely persons of similar economic profiles who have children," noted Judge Knapp, in finding that the content and the market of the two products were closely competitive, although the products were not identical. Gruner + Jahr did not show that it planned to expand its business to include producing the type of "digest" publication sold by Meredith.

The evidence presented did not establish actual confusion, and, in this case, the absence of evidence of actual confusion weighed heavily against a finding of likelihood of confusion, declared Judge Knapp.

The court next declined to draw any inference of bad faith from Meredith's use of the word "parents" for a magazine addressing the concerns of individuals responsible for caring for children. And the evidence established that, due to the manner magazines are normally displayed, the use of smaller print for the words "Ladies' Home Journal" did not minimize the impact of those words. The court refused to infer the intention to produce confusion from the mere use of the smaller print.

In all, Meredith's use of the challenged title was not likely to cause confusion and the court therefore denied injunctive relief.

Gruner+Jahr USA Publishing v. Meredith Corporation, 793 F.Supp. 1222 (S.D.N.Y. 1992) [ELR 14:12:9]

Hole-in-one insurer is ordered to pay claim to golf tournament sponsor

Crawford Chevrolet agreed to provide a new vehicle to any participant in a Santa Fe golf tournament who scored a hole-in-one on a certain hole during the tournament. Crawford obtained insurance through the National Hole-in-One Association, a company that insures golf tournament sponsors against the risk that a player will score a hole-in-one and the sponsor will have to deliver the prize.

In applying for insurance, Crawford noted, among other information, that 65 shots would be taken on the target hole; the car dealer later notified the insurer that the number of players would be 60 rather than 65.

One of the golfers scored a hole-in-one on the designated hole, hole number nine, but on his second time around the course, i.e., on the eighteenth hole in the tournament. Crawford delivered the prize vehicle and made a claim for coverage.

The insurer denied coverage on the ground that the hole-in-one occurred on hole number eighteen, which was not the target hole listed in the insurance application.

When Crawford sued the insurer for breach of contract, a New Mexico trial court awarded Crawford about $20,000 in damages and costs.

The New Mexico Supreme Court affirmed the trial court decision.

The insurer argued that Crawford, in the insurance application, had specified 60 shots on the target hole. If the car dealer had intended to purchase coverage for a hole-in-one scored on the first or second round of the course, it should have specified 120 shots, according to the insurer. And a warranty provision on the back of the application stated: "Target Hole - Only one predesignated hole may be used on the target hole green. Nine (9) hole courses must specify which hole(s) will be eligible during the official insured round. Insurance does not apply unless prize is offered on the EXACT target hole as specified in this certificate."

Crawford claimed that the insurance contract was ambiguous because "hole #9" was subject to at least three different interpretations: physical hole #9, on either the first or second round of the course; physical hole #9, but only the first time around the course; and the ninth hole played, regardless of whether it was physical hole #9.

The court agreed with Crawford that the contract was ambiguous, but on the basis that the term "shots" was ambiguous - the term could mean either the number of attempts to score a hole-in-one on physical hole #9, or the number of golfers playing physical hole #9. The application did not define the term, nor was there any applicable definition in the United States Golf Association's rules of golf. However, it was noted that the record indicated that the parties intended "number of shots" to mean "number of players." The application did not inform applicants that, in an eighteen-hole game played on a nine-hole course, the number of shots would be twice the number of players if the applicant intended to insure the physical hole on both the first and second rounds of play. Furthermore, the insurer had referred, in a letter to Crawford, to the number of shots as the number of players.

The court found that the parties intended that "number of shots" would mean the "number of players," and therefore interpreted the contract as providing insurance against the risk that any of the sixty players might score a hole-in-one on hole #9, either on his/her first or second time around the nine-hole course.

The warranty provision did not require a different interpretation since the provision itself was ambiguous, stated Judge Montgomery, who concluded that the contract provided coverage for the hole-in-one scored on physical hole #9 while the golfer was playing his second round on the nine-hole course.

Chief Judge Ransom, specially concurring, found it "difficult to see any ambiguity in the risk underwritten by Hole-in-One, namely, sixty shots on the ninth hole as carded by each player." The winning golfer carded his hole-in-one as the eighteenth hole while playing number nine the second time. However, Judge Ransom stated that he was persuaded that the majority, along with the trial court, were reasonable in resolving the apparent ambiguity in the meaning of "shots" and "holes," and thus "reluctantly" concurred.

Crawford Chevrolet, Inc. v. National Hole-in-One Association, 828 P.2d 952 (N.Mex. 1992) [ELR 14:12:10]

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Amateur baseball player may proceed with negligence claim against baseball association, rules Wisconsin appellate court

Jeff Kloes was pitching for the Eau Claire Cavalier Baseball Association during a night game at a municipal park when he was struck in the face with a batted ball. Kloes sued the association, the association's insurer, and the city of Eau Claire's insurer. Kloes claimed that the inadequate lighting at the park prevented him from seeing the ball and reacting in time to avoid injury.

A trial court granted summary judgment dismissing Kloes' action.

A Wisconsin appellate court first agreed with the trial court's ruling that the city was immune from liability for Kloes' injury under the state's recreational immunity statute, stating that the city was insufficiently involved with the association's baseball activities to fall within the definition of a sponsor.

The trial court also had found that Kloes voluntarily confronted an open and obvious danger, and that, as a matter of law, his negligence exceeded any negligence on the part of the association.

Presiding Judge Cane did not agree that participating in an evening baseball game at the city park, knowing that the lights were inadequate and that there was a danger of being hit by a batted ball presented an open and obvious danger. The open and obvious danger rule is not an absolute defense, state Judge Cane, but is a weighing of negligence as a matter of law. The rule applies when a party voluntarily confronts an open and obviously dangerous condition and a reasonable person in that position would recognize the condition and the danger the condition presents. The rule has been applied under very limited circumstances, stated Judge Cane, and only where there is a high degree of probability that the condition or danger confronted will result in harm.

Baseball is not necessarily dangerous, observed the court. Although there is some danger that a player may be hit by a batted ball during a game, and that the danger may be increased by inadequate lighting, the court declined to say that participating in a baseball game under such circumstances is a danger that presents a high degree of probability of harm so as to constitute an open and obvious danger. Kloes may not have exercised ordinary care for his own safety when he pitched the game at the park. But such negligence, as a matter of law, may not have been greater than the negligence attributable to the association; the association also had claimed that the lighting was inadequate but continued to schedule the team to play night games at the park.

The court reversed the portion of the judgment dismissing Kloes' action against the association and its insurer, and remanded the matter for a factual determination of whether the park's lighting was adequate, and a determination of causal negligence and its apportionment among the parties.

Kloes v. Eau Claire Cavalier Baseball Association, Inc., 487 N.W. 2d 77 (Wisc.App. 1992) [ELR 14:12:11]

Washington Supreme Court orders further proceedings in minor's negligence action against ski school and ski resort operator

In March 1989, twelve year old Justin Scott sustained severe head injuries while skiing at a resort owned by Pacific West Mountain Resort. At the time of his injury, Justin was skiing on a slalom race course which was laid out by the privately owned Grayson Connor Ski School, allegedly according to instructions from an agent of the ski resort.

Justin's mother had signed an application for the ski school; the application stated, in part, that the participant agreed to hold harmless the ski school, its owner and any instructor or chaperon "from all claims arising out of the instruction of skiing or in transit to or from the ski area." The participant also agreed to accept full responsibility for the cost of treatment for any injury suffered while taking part in the program.

Justin apparently missed one of the gates, left the race course, was ejected out of his skis, and collided with the unpadded supports of a tow-rope shack.

A Washington trial court granted the motions for summary judgment brought by the ski school and the ski resort.

The Washington Supreme Court first found that the language of the purported exculpatory clause contained in the ski school application was sufficiently clear to give notice that the school was attempting to be released from liability for its negligent conduct. The court agreed with decisions holding that clear and unambiguous exculpatory language can eliminate negligence liability without expressly using the word "negligence." The fact that the application used the words "hold harmless" rather than the word "release" did not affect the issue of whether the application served to exculpate the ski school from liability for its own alleged negligence.

Judge Andersen then found that a parent does not have the legal authority to waive a child's own future cause of action for personal injuries resulting from a third party's negligence. The question of whether such exculpatory clauses would violate public policy was a question of first impression in Washington, stated the court.

It was noted that Washington cases have upheld exculpatory clauses in favor of private parties in various high risk sports-related situations. However, those cases did not involve a release signed by a parent purporting to release a party from liability for negligent injury to a child. Under Washington law, parents may not settle or release a child's cause of action after injury without prior court approval, and in any settlement of a minor's claim, the state provides that a guardian ad litem must be appointed (unless the child is represented by independent counsel) and a hearing held to approve the settlement.

In all, to the extent a parent's release of a third party's liability for negligence purports to bar a child's own cause of action, it violates public policy and is unenforceable, ruled the court. However, "an otherwise conspicuous and clear exculpatory clause can serve to bar the parents' cause of action based upon injury to their child."

Judge Andersen next concluded that primary implied assumption of risk continued to be a complete bar to recovery after the state's adoption of comparative negligence laws. Primary assumption of risk occurs when a party has impliedly consented to assume a duty. If the party being sued had no duty, there was no breach and therefore, no negligence, stated the court.

The court recalled that the dismissal of the action against the ski school was based upon the language in the application; there was no release with regard to the ski resort operator. In response to the question of what risks Justin impliedly assumed by choosing to engage in the sport of skiing, Judge Andersen considered what duties the ski resort owed to Justin and what risks the child assumed. The court stated that the operator of a ski area owes a duty to a skier to discover dangerous conditions through reasonable inspection, and repair that condition or warn its invitees, unless the condition is known or obvious. The state's ski statute imposes certain duties on skiers and on ski operators, but does not purport to relieve ski operators from all liability for their own negligence.

The resort argued that it owed no duty to Justin because the shed was an obvious hazard. However, the evidence presented included an expert's declaration stating that from the top of the course, Justin could not have appreciated the danger posed by the proximity of the course to the shed. Implied primary assumption of the risk means a party assumes the dangers that are "inherent in and necessary to the particular sport or activity" (emphasis by the court). Although Justin may have assumed the risks inherent in the sport of skiing, it remained to be determined whether all the risks which caused his injuries were inherent in the sport. It appeared that Justin did not just collide with an obvious stationary object because of difficult snow conditions - the race course may have been laid out in an unnecessarily dangerous manner that was not obvious to a young novice ski-racing student, and the course may have been placed dangerously close to an unfenced, unpadded, abandoned shed. Again, while participants in sports are generally held to have impliedly assumed the risks inherent in the sport, "such assumption of risk does not preclude a recovery for negligent acts which unduly enhance such risks."

Judge Andersen concluded by finding that under the facts presented, the trial court should not have applied the doctrine of primary implied assumption of risk as a complete bar to Justin's recovery against the ski resort operator. Any contributory negligence on Justin's part would reduce, rather than bar, Justin's recovery. The decision granting summary judgment in favor of the ski resort operator therefore was reversed and remanded for further proceedings. The decision granting summary judgment in favor of the ski school was reversed and remanded with respect to Justin's cause of action, but Judge Andersen affirmed the dismissal of the Scotts' cause of action.

Scott v. Pacific West Mountain Resort, 834 P.2d 6 (Wash. 1992) [ELR 14:12:11]

Skier injured in collision loses appeal of judgment entered on jury verdict in favor of other skier

In February 1989, David Dillworth and Andrew Gambardella collided in a skiing accident. When Dillworth sued Gambardella alleging negligence, a Federal District Court referred, in its instructions to the jury, to 1037 of the Vermont Sports Injury Statute which provides that "a person who takes part in any sport, including skiing, accepts, as a matter of law, the inherent dangers of the sport, insofar as those dangers are obvious and necessary to the participant." The jury was asked to determine whether the accident was obvious and necessary as a part of skiing; if so, stated the District Court, the verdict would be for Gambardella. The court also issued instructions on the law of negligence and comparative negligence, and gave a standard charge covering a skier's duty of ordinary care.

The jury returned a verdict in favor of Gambardella.

A Federal Court of Appeals has affirmed the District Court's entry of judgment on the verdict.

Judge Cardamone, after careful review, declared that the case law suggested that primary assumption of risk is properly evaluated in terms of the duty owed by a party. However, with the passage of 1037, a party in a sports injury action may request that a jury be charged using the language of the statute, rather than "substantively equivalent language" regarding the duty of a party.

The court rejected Dillworth's claim that the defense provided by 1037 was available only to operators of ski areas or other sports facilities, and also rejected the argument that an "inherent danger" instruction should not have been given in the case. Judge Cardamone stated that "absent legislative direction to the contrary, the question of what dangers inhere in a sport is generally for a jury." Thus, the issue of primary assumption of risk was properly sent to the jury, and the jury's conclusion that primary assumption of risk applied in the case was not erroneous as a matter of law.

Collisions between skiers are not always the product of at least one party's failure to use reasonable care, stated the court. A jury might conclude that skiers who lose control even while exercising due care, i.e., not breaching any duty owed to other skiers, may present a danger which is inherent, obvious and necessary to participants in the sport of skiing. Sufficient evidence was presented to support a finding that the collision was an inherent danger in the sport of skiing, and the Dillworth "knew of, appreciated, and voluntarily accepted that danger." And the evidence supported the jury's finding that Gambardella was exercising reasonable care and was not negligent.

The court concluded by stating that it was not necessary to consider whether 1037 created an exception to Vermont's comparative negligence statute by reviving secondary assumption of risk (contributory negligence) as a defense available in sports injury cases.

Dillworth v. Gambardella, 970 F.2d 1113 (2d Cir. 1992) [ELR 14:12:12]

New trial is ordered in injured skier's negligence action against resort operator

Sylvio J. Pitasi claimed that he was left paralyzed from the neck down due to injuries suffered in a skiing accident at Stratton Mountain, a ski resort owned and operated by the Stratton Mountain Corporation. Pitasi alleged that the injuries resulted from Stratton's negligence in failing to rope off the side entrances to a closed trail.

A Federal District Court jury found that both Pitasi and Stratton had been negligent, but attributed eighty percent of the liability for the accident to Pitasi. Under Vermont's comparative negligence statute, the jury's findings precluded recovery by Pitasi and his wife. The court entered judgment in favor of Stratton.

A Federal Court of Appeals has reversed the District Court's decision and remanded the matter for a new trial.

Judge Altimari noted that Stratton, after deciding to close a trail called "East Meadow," only roped off the top entrance to the trail; no rope or warning sign was placed at any of the trail's side entrances. Immediately after Pitasi's accident, Stratton ordered its employees to place warning signs and ropes across the side entrances to the East Meadow trail.

Stratton argued that the risk posed by the East Meadow trail was so obvious that there was no need for any sign, rope, or other warning. Pitasi sought to introduce into evidence Stratton's subsequent remedial measures, but the District Court refused to allow the jury to hear this evidence.

Judge Altimari agreed with Pitasi that the District Court abused its discretion. Although testimony concerning subsequent remedial measures is not admissible "to prove negligence or culpable conduct," such evidence is admissible to rebut a defense based upon the nature or condition of the accident scene. Pitasi did not seek to introduce Stratton's subsequent remedial measures in order to prove that Stratton was negligent, but to rebut the company's defense that Pitasi was contributorily negligent because the dangerous conditions on East Meadow were so obvious that warning signs or ropes at the trail's side entrances were unnecessary. Because Pitasi was unable to introduce the remedial measures into evidence, stated the court, it was impossible for him to rebut Stratton's argument that he was contributorily negligent. The probative value of the evidence clearly outweighed its prejudicial effect, and its exclusion was an abuse of discretion, ruled Judge Altimari.

The District Court also erred in excluding evidence concerning Stratton's closing of the side entrances to East Meadow in prior years, evidence that was "highly relevant and material to impeach the credibility of [Stratton's] employees..."

Judge Altimari then agreed with Pitasi that the District Court erred by failing to instruct the jury on what effect, if any, Stratton's season pass should have been given, and how the pass should have been construed. Pitasi signed the pass agreement while he waited on line at the ski lodge before his first run of the season; the pass provided, in part, that the pass holder would "assume all risk of personal injury to himself and loss of or damage to his personal property."

The court found that the District Court did not err in admitting the pass into evidence and correctly left for the jury the question of whether the exculpatory language of the season pass precluded recovery, but should not have done so without providing the jury with sufficient instruction. Judge Altimari therefore concluded that a new trial was required because the jury was not instructed regarding the pass's construction or consequence, "which were potentially dispositive in this case. This lack of instruction undoubtedly left the jury confused about the extent to which Pitasi assumed the risk of injury while skiing, and this may well have affected the jury's apportionment of liability to the detriment of Pitasi."

Pitasi v. Stratton Corporation, 968 F.2d 1558 (2d Cir. 1992) [ELR 14:12:13]

Kentucky Supreme Court upholds decision ordering release of university's response to NCAA inquiry

A Kentucky trial court held that a portion of a report to the National Collegiate Athletic Association, prepared at the direction of and signed by the President of the University of Kentucky, was subject to public disclosure under the Kentucky Open Records Act, while other portions of the report were exempt. An appellate court reversed the decision of the trial court, holding that the entire response of the university was a public record which was not exempt from public disclosure under the Act.

In affirming the appellate court decision, the Kentucky Supreme Court stated that in July 1988, the NCAA notified the university of an official inquiry concerning alleged rules violations arising from the alleged involvement of members of the university's athletic staff in sending a package containing $1,000 in cash to a basketball recruit in Los Angeles. The university released the NCAA's letter of "official inquiry" to the press. The university subsequently received a supplemental inquiry concerning several other rules violations. A redacted copy of the letter and a summary of the NCAA's allegations were released to the public.

The Louisville Courier-Journal and other newspapers filed an open records request seeking the entire supplemental official inquiry. When the university refused to disclose the complaint, the newspaper and the school filed a joint petition for declaration of rights. The trial court granted the newspaper parties access to, as described by Kentucky Supreme Court Special Judge R. Burl McCoy, the "bulk" of the NCAA complaint.

In a subsequent proceeding concerning the disclosure of the university's response to the NCAA's allegations, the trial court, after reviewing the contents of the response, ordered the disclosure of one of the sections of the response but found that two other sections of the report were not final and that "premature release might prejudice the integrity of the investigation to the detriment of the University."

In agreeing with the appellate court that the two sections at issue were part of the university's official response to the NCAA and were not subject to any exemption from disclosure, Judge McCoy stated that the contents of the response were a matter of public interest and that releasing the response would not constitute an unwarranted invasion of personal privacy. When the university disclosed the material contained in the response to the NCAA, it subjected those documents to full disclosure once the university's action became final.

The court concluded by declining to adopt a "self-critical analysis" privilege which would exempt from disclosure self-evaluative documents. Even if there were such a privilege, the university waived the privilege, stated Judge McCoy, by releasing the response to the NCAA.

University of Kentucky v. Courier-Journal & Louisville Times Company, 830 S.W.2d 373 (Ky. 1992) [ELR 14:12:14]

Briefly Noted:

Elvis Presley Concert Tickets.

A New York appellate court has affirmed a trial court ruling (ELR 12:6:8) finding that the state of New York was entitled to more than $80,000 in unrefunded ticket proceeds from an Elvis Presley concert which had been scheduled for August 22, 1977 at the Nassau Coliseum.

The concert was canceled following Presley's death on August 16, 1977.

Upon the expiration of a six year statutory period in which the ticket holders could demand a refund (based on a contract theory), concert promoter Jerry Weintraub, doing business as Management III, along with other parties involved with the estate of the performer, sought to recover the unclaimed funds.

The trial court noted that although it was unlikely that any of the ticket holders would apply to the state's Abandoned Property Law fund for reimbursement, state law required that the fund be retained and made available to ticket holders, upon request, at any future time.

The appellate court also agreed with the finding that the memorabilia value of the tickets, "even if proven, would not affect the rights of the holders to a refund or the rights of the State under the Abandoned Property Law..."

Presley v. County of Nassau, New York Law Journal, p. 25, col. 4 (N.Y.App., Dec. 28, 1992) [ELR 14:12:14]

Sexual Harassment.

Marjorie Thoreson, as reported at ELR 14:1:8; 12:10:11, sued her former employer Penthouse International and Robert Guccione, Penthouse's chairman and principal shareholder, alleging sexual harassment. A New York trial court found that the Penthouse parties exploited Thoreson as an employee by, among other conduct, coercing her, as an implicit condition of her employment, into having sexual liaisons with two of Guccione's business associates. The court awarded Thoreson compensatory damages of $60,000 and $4 million in punitive damages.

An appellate court decision upholding the award of compensatory damages, but ruling that punitive damages were not available under Executive Law 297(9), known as the Human Rights Law, has been affirmed by the New York Court of Appeals.

Judge Stewart F. Hancock, Jr. stated that, based on the statutory language and the relevant legislative history, punitive damages were not recoverable. It was noted that the legislature "has consistently been concerned with rectifying the wrong to the injured party caused by the discriminatory practice - not punishing the transgressor..." It was noted that in 1991, the legislature amended the Human Rights Law to add a specific provision for the award of punitive damages not to exceed the amount of $10,000, but that the amendment applied only in cases of housing discrimination.

Thoreson v. Penthouse International, Ltd., New York Law Journal, p. 22, col. 3 (N.Y., Dec. 29, 1992) [ELR 14:12:15]

Clothing Design.

North Coast Industries held a copyright in a design comprised of a geometric arrangement of color blocks banded in heavy lines; North Coast used the design, which, according to Federal Court of Appeals Judge Schroeder, was "undeniably influenced by the work of the great twentieth century painter Piet Mondrian," on the front of womens pullover tops. Judge Schroeder also observed that the work of Mondrian has been associated with the French fashion designer Yves St. Laurent.

When North Coast claimed that Jason Maxwell, Inc. was selling clothing featuring a similar design, a Federal

District Court found that North Coast failed to establish that it had a valid copyright. The court stated that the design contained no non-trivial differences from the work of Mondrian and St. Laurent.

Judge Schroeder concluded that the District Court erred and that the extent of the creative differences between the North Coast design and the preexisting Mondrian and St. Laurent works was a question of fact for the jury. The design of rectangular shapes was similar to but not identical to the St. Laurent design inspired by Mondrian. And the District Court, stated Judge Schroeder, did not focus on the critical distinction between idea and the expression of the idea. For while the "idea" of using bounded geometric figures in a pattern clearly was borrowed, it was not clear that the "expressions" of that idea in the designs at issue were substantially similar, and North Coast was entitled to have the validity of its copyright determined by a trier of fact.

North Coast Industries v. Jason Maxwell, Inc., 972 F.2d 1031 (9th Cir. 1992) [ELR 14:12:15]

Libel.

Charles J. Patterson and G. Lee Tippin wrote a book entitled "The Heroes Who Fell From Grace: The True Story of Operation Lazarus, the Attempt to Free American POW's from Laos in 1982." The book contained a passage stating: "Gordon Wilson called on the 25th. When Gritz asked about the team members' pay, Gordon said that over $27,000 had been collected in the fund raising. However, he claimed that there was nothing left because Jack Bailey and retired Congressman Donald Bailey (no relation) had taken off with the money to Geneva, Switzerland."

Donald Bailey was a Congressman from 1979 through 1982; from 1985 to 1989, Bailey was the Auditor General of the Commonwealth of Pennsylvania.

Bailey sued the authors and the publishers of the hardbound and paperback editions of "Heroes," alleging defamation and invasion of privacy.

A Federal District Court in Pennsylvania first denied the publishers' motion for summary judgment based on the statute of limitations, stating that Bailey raised questions of fact concerning when Heroes was offered for sale in Pennsylvania bookstores and when, through the exercise of reasonable diligence, Bailey should have discovered the allegedly defamatory material.

The court then found that Bailey did not establish actual malice on the part of the publishers; entered judgment in favor of the publishers and Patterson; and granted Tippin's motion to dismiss for insufficient service of process.

Bailey v. Dell Publishing Company, Inc., 790 F.Supp. 101 (W.D.Pa. 1992) [ELR 14:12:15]

Jurisdiction/Art Dispute.

Murray Gribin sold a painting by Marie Laurencin entitled "Three Young Ladies" to Jules Brassner for $450,000 in June 1990. Gribin did not know that Hammer Galleries was Brassner's partner in the purchase and provided half of the purchase price.

Brassner and the Hammer Galleries planned to resell the painting to a Japanese buyer; the buyer wanted Daniel Marchessau, an expert on Marie Laurencin to examine the painting. Marchessau refused to include the work in his Catalogue Raisonne of the artist's works.

Gribin brought an action for declaratory judgment as to the authenticity of the painting.

The Hammer parties argued that the court should not apply the Declaratory Judgment Act to deprive them of their choice of forum with respect to proposed claims for fraud and breach of contract.

The court concluded that Gribin "artfully filed this action as a preemptive maneuver in anticipation of his defense and in order to seize a California forum," and the court therefor exercised its discretion to dismiss the action without prejudice.

Gribin v. Hammer Galleries, a Division of Hammer Holdings, Inc., 793 F.Supp. 233 (C.D.Ca. 1992) [ELR 14:12:16]

Film Damage.

Professional photographers S. Donald Valenti and Patricia Valenti sued Qualex, Inc. for allegedly damaging the images on 43 rolls of film and breaching its agreement to develop the film properly.

A Federal Court of Appeals has affirmed a District Court decision granting summary judgment to Qualex.

The Valentis, while visiting Spain, shot 427 rolls of film. A local camera store delivered the film to Qualex, which damaged some of the rolls.

The District Court found that there was neither a direct contractual relationship between Qualex and the Valentis nor a contract established by an agency relationship between Qualex and the camera store.

The court also noted that the Valentis sought $1,500 per negative, or a total of $2.4 million, alleging lost income from assets they intended to sell. Illinois case law bars the recovery of economic damages in negligent tort actions, and the court, accordingly, granted summary judgment to Qualex on the negligence claim as well.

Senior District Court Judge Robert A. Grant, sitting by designation, agreed that the Valentis failed to demonstrate a direct contract with Qualex or an agency relationship between Colonial and Qualex; noted that the Valentis' contract arguments were based on mere allegations, unsubstantiated by specific facts; and found that Qualex was entitled to summary judgment on the breach of contract claim.

With respect to their negligence claim, the Valentis unsuccessfully sought to distinguish between unrecoverable damages arising out of a defective product, and damages arising from a "defective service" performed upon their film; the Illinois Supreme Court has rejected the distinction.

Valenti v. Qualex, Inc., 970 F.2d 363 (7th Cir. 1992) [ELR 14:12:16]

Women's Golf Magazine.

Sometime prior to March 1989, Tom O'Keefe and Brendan J. Kelly presented to various publishing companies including the Meredith Corporation, a proposal and business plan for a magazine designed for women golfers. When the Meredith representative inquired about whether the proposed magazine would compete with an existing magazine, Kelly mentioned a small magazine entitled "GFW."

Eventually, Meredith purchased GFW, began publishing the magazine under the name "Golf for Women," and notified O'Keefe and Kelly that the company had no interest in their proposal.

When Woman Golfer, Inc. (wholly owned by O'Keefe and Kelly) sued Meredith alleging misappropriation of an idea, breach of implied contract in fact, fraud and quasi-contract, Federal District Court Judge Kevin Thomas Duffy pointed out that there was nothing novel or original in the idea of a women's golf magazine, and rejected Woman Golfer's claim that the "unique combination of elements comprising its business plan" was an original idea.

It also was found that Woman Golfer did not demonstrate that Meredith used its idea in any way, and, in all, did not satisfy its burden of demonstrating a property interest in the idea. The court, accordingly, granted Meredith's motion for summary judgment dismissing the complaint.

Woman Golfer, Inc. v. Meredith Corp., 792 F.Supp. 211 (S.D.N.Y. 1992) [ELR 14:12:16]

"Sesame Street" Products.

In July 1984, Children's Television Workshop granted Justin Products a license to develop and distribute a line of radio products using the image and/or name of certain characters associated with the Sesame Street television program. Justin agreed to pay royalties to Children's Television Workshop, with a guaranteed minimum royalty during the term of the agreement. Justin also was entitled to sell off all of its unsold finished inventory during the six month period following the conclusion of the agreement.

The initial two year term of the agreement was extended several times. In June 1989, the agreement was extended for a one year period, and the minimum guaranteed royalty was increased to $75,000.

Children's Television Workshop eventually claimed that Justin owed the Workshop about $51,000 in royalty payments, with about $30,000 of the amount representing the difference between royalties actually received and the guaranteed amount of $75,000. The Workshop also claimed that Justin owed about $18,800 for sales made after June 30th, during the sell-off period, and about $2,200 in sales outside the United States and Canada (Justin conceded the latter obligation).

New York trial court Judge Cahn found that the agreement guaranteed Children's Television Workshop a minimum royalty of $75,000 for the one year period ending on June 30, 1990, which did not include, as argued by Justin, the six month sell-off period. Justin was not entitled to apply any royalties from sales made during the sell-off period to offset the balance of the guaranteed amount, stated the court in granting the

Workshop's motion for summary judgment on its amended complaint.

Justin presented a counterclaim based on a July 1989 agreement authorizing the company to develop and sell a "Dancing Big Bird Radio." Justin paid the Workshop about $130,000 in royalties, but soon after the payment was made, the company began to receive returns of the product. Justin sought reimbursement for overpayment of royalties in the amount of about $9,100, but the court found that the agreement was ambiguous as to the question of whether Children's Television Workshop was obligated to refund royalties already paid.

The court concluded by dismissing Justin's counterclaim alleging that the Workshop acted in bad faith with respect to the negotiation of a further renewal of the agreement.

Children's Television Workshop v. Justin Products, Inc., New York Law Journal, p. 24, co. 2 (N.Y.Cnty., Jan. 7, 1993) [ELR 14:12:16]

T-Shirt Infringement.

Fashion Victim, Ltd. sold a T-shirt called "Skeleton Woopee," with a copyrighted design depicting skeletons engaged in sexual activities. Sunrise Turquoise, Inc. sold a T-shirt called "Boners," depicting skeletons in eight sexual positions, six of which Fashion claimed were the same as those on the "Skeleton Woopee" design.

A Federal District Court in Illinois has found that Fashion was not entitled to a preliminary injunction, stating that the company failed to demonstrate the requisite likelihood of success on the merits. It was found that Sunrise did not have access to Fashion's registered copyrighted work, nor was Sunrise's product "substantially similar" to Fashion's product. The many differences between the competing designs negated any infringement, stated the court, while all of the similarities were the natural result of the limitations of the subject matter. To grant Fashion a preliminary injunction would "impermissibly extend the protection of the law to the nonprotectible idea of depicting skeletons as engaged in sexual activity of various kinds" (emphasis by the court).

With respect to Fashion's trade dress infringement claim the court noted that the protection for trade dress does not extend to an idea.

The court, in dissolving the temporary restraining order obtained by Fashion, concluded that the balance of harm factor weighed in favor of Sunrise, and that the denial of a preliminary injunction would best serve the public interest.

Fashion Victim, Ltd. v. Sunrise Turquoise, Inc., 785 F.Supp. 1302 (N.D.Ill. 1992) [ELR 14:12:17]

Negligence/Travel Guide.

Joseph and Gail Birmingham, based on information contained in "Fodor's Hawaii 1988," decided to go to Kekaha Beach on Kauai to body surf and swim. Joseph Birmingham sustained personal injuries from body surfing in the ocean waters off the beach.

The Birminghams brought a negligence action, but a trial court granted summary judgment in favor of Fodor's, the state, and the county of Kauai.

The Supreme Court of Hawaii affirmed the trial court's ruling on behalf of Fodor's and the state, but reversed and remanded the decision with respect to the county.

Judge Levinson first found that "a publisher of a work of general circulation, that neither authors nor expressly guarantees the contents of its publication, has no duty to warn the reading public of the accuracy of the contents of its publication." Thus, Fodor's had no duty to warn the Birminghams of the accuracy of the information contained in the guide.

The court also found that the travel guide was not a product and that the Birminghams had no claim for relief based on strict/product liability against Fodor's.

Judge Levinson next determined that because the ocean condition causing the injury was not a dangerous unnatural condition, the state had no duty to warn the Birminghams of the wave conditions off Kekaha Beach.

The court concluded by finding that issues of material fact were raised as to whether the Birminghams were impliedly invited onto Kekaha Beach by the county, and if the Birminghams were so invited, whether the ocean conditions were "extremely dangerous conditions which were not readily apparent to persons of ordinary intelligence."

Birmingham v. Fodor's Travel Publications, Inc., 833 P.2d 70 (Hawaii 1992) [ELR 14:12:17]

Preinjury Release.

Robert D. Hiett sustained an injury which rendered him a quadriplegic while participating in a triathlon sponsored by the Lake Barcroft Community Association. The injury occurred when Hiett dove into the lake and struck his head on either the lake bottom or an object beneath the water surface.

Hiett had signed an entry form containing a waiver of damages for any injuries suffered in the event.

A trial court initially held that, absent fraud, misrepresentation, duress, illiteracy, or the denial of an opportunity to read the form, the entry form was a valid contract releasing the Lake Barcroft parties from liability. The court then conducted an evidentiary hearing and determined that there was sufficient evidence to present to a jury on the issue of constructive fraud and misrepresentation.

The trial court, after Hiett rested his case, granted the Lake Barcroft parties' motion to strike the evidence.

The Virginia Supreme Court has ruled that the pre-injury release signed by Hiett was prohibited by public policy and was void.

Hiett v. Lake Barcroft Community Association, Inc., 418 S.E.2d 894 (Va. 1992) [ELR 14:12:18]

Race Track Groom Injury.

Patricia Kerrick was injured when she was kicked by a thoroughbred race horse that she was leading from an exercise area to a barn at a race track owned by the Finger Lakes Racing Association, Inc. and Canandaigua Enterprises, Inc. Kerrick claimed that the race track owners were negligent in constructing and maintaining an open ditch for the drainage of surface waters when they allegedly knew or should have known that thoroughbred horses are frightened by the presence of running water.

A New York trial court decision granting the race track owners' motion for summary judgment has been reversed by an appellate court.

The court stated that the affidavit of Kerrick's expert was sufficient to raise a triable issue of fact on the issue of the alleged negligence with respect to the open culvert. With respect to the issue of proximate cause, it was noted that the record indicated that it had rained prior to the incident; that water was running down the open culvert at the time of the accident; that Kerrick had no prior difficulty in handling the horse; and that "it was common knowledge that thoroughbred horses are frightened by the presence of running water and, when, frightened, often kick and rear up in attempting to escape their handlers." The facts and circumstances set forth by Kerrick were sufficient to raise a triable issue of fact as to proximate cause, concluded the court.

Kerrick v. Finger Lakes Racing Association, Inc., 581 N.Y.S.2d 944 (N.Y.App. 1992) [ELR 14:12:18]

Student Athlete Fatality.

Drew Kleinknecht, a student at Gettysburg College and a member of its lacrosse team, suffered cardiac arrest and died at an off-season lacrosse practice.

Kleinknecht's parents claimed that the college's negligence was a legal cause of their son's death. The Kleinknechts argued that the college should have had the capacity, at the practice, to provide prompt treatment in the event a student suffered cardiac arrest. According to the Kleinknechts, the college did not have a written plan to deal with medical emergencies; failed to insure that coaches present at practices were certified in CPR; and did not have communication devices at the practice field. These measures purportedly would have meant a faster response to Drew's medical emergency; the delay in treatment, stated the Kleinknechts' medical experts, was a substantial factor in Drew's death.

A Federal District Court in Pennsylvania has concluded that the college had no duty to anticipate and guard against a healthy student athlete's cardiac arrest that occurred in a manner unconnected to the risks of the game. Judge Caldwell stated that a duty should not be imposed unless an event is reasonably foreseeable, although noting that in deciding not to impose a duty, the court's conclusion "shade[d] off into ...broad areas of policy concern." If the court agreed with the Kleinknechts, there might not be any "principled way of limiting the College's duty to athletic practices or contests involving student athletes who are members of the College's athletic teams." Various precautions might be required at intramural games, and possibly even at other college functions not involving physical activity; the decision to impose such a responsiblity should be left to the legislature, commented the court.

Judge Caldwell vacated a prior order and entered summary judgment on behalf of the college on the Kleinknechts' claim that it was negligent in failing to provide

CPR trained coaches and trainers at the practice or otherwise have in place measures to deal immediately with an athlete's condition.

The college also was not negligent, ruled Judge Caldwell, in its response to the athlete's collapse.

Kleinknecht v. Gettysburg College, 786 F.Supp. 449 (M.D.Pa. 1992) [ELR 14:12:18]

IN THE NEWS

Los Angeles jury awards $8.9 million to production company in breach of contract action against Kim Basinger

A Los Angeles trial court jury has awarded Main Line Pictures damages of $8.9 million in the company's breach of contract action against actress Kim Basinger.

Basinger claimed that she never agreed to star in Main Line's film "Boxing Helena," but the jurors found that Basinger entered an oral contract to appear in the film and that the actress breached the contract when she withdrew from the film shortly before the beginning of principal photography in 1991. According to news reports, the jurors also found that Basinger denied in bad faith the existence of the contract.

The damage award consisted of about $7.4 million in compensatory damages and $1.5 million for bad faith denial of the contract. Main Line stated that on the basis, in large part, of Basinger's purported agreement to appear in the film, the company obtained commitments for $7.6 million in foreign pre-sales and $3 million in domestic distribution. When the film was made with a less-well known actress, Main Line claimed that it generated only $2.7 million in pre-sales to foreign distributors.

The jury, although finding that Basinger acted with fraud, malice or oppression, declined to award punitive damages to Main Line.

Main Line also had sued Basinger's talent agency, International Creative Management, but the court, in an earlier ruling, granted the agency's motion to dismiss.

It has been reported that Basinger plans to appeal the verdict. [May 1993][ELR 14:12:19]

Actor Gary Coleman obtains $1.3 million award in action against parents and former manager

A Santa Monica trial court judge has awarded Gary Coleman about $1.3 million in the actor's lawsuit against his parents and his former business manager, Anita DeThomas.

According to news reports, Judge Hiroshi Fujiksaki ruled that W.G. and Edmonia Sue Coleman and DeThomas wrongfully profited as Coleman's trustees during the years 1982-1987. The award compensated for excessive commissions, salaries, fees and pension distributions paid to Coleman's parents. DeThomas did not share in these payments, but will be held jointly liable for the award, subject to a reversal of the court's ruling in the event of an appeal. [May 1993] [ELR 14:12:19]

Federal District Court jury awards former football player Brian Bosworth damages of $7 million in action against insurer

A Federal District Court jury has determined that Lloyd's of London must pay former Seattle Seahawks player Brian Bosworth $7 million for the player's 1989 career-ending shoulder injury.

The insurer had refused to pay Bosworth's claims under two policies that were taken out by the Seahawks. The jury, according to news reports, awarded Bosworth the $5.1 million amount of the policies and $1.9 million in interest.

Lloyd's argued that arthritis ended Bosworth's career, and that the condition was not covered under the policies. [May 1993] [ELR 14:12:19]

Jury awards $200,000 to businessman in breach of contract and fraud action against Zsa Zsa Gabor

A Federal District Court jury in Texas has awarded $200,000, but declined to award punitive damages, to Leonard Saffir in a breach of contract and fraud action against Zsa Zsa Gabor. Gabor allegedly failed to fulfill a personal appearance contract.

In a previous trial, a jury awarded Saffir $3 million; according to news reports, the court rejected that award because Gabor hadn't attended the trial. [May 1993] [ELR 14:12:19]

DEPARTMENTS

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