

RECENT CASES

California Court of Appeal affirms libel judgment in favor of psychologist Paul Bindrim against author Gwen Davis and Doubleday, the publisher of her novel *Touching*

The California Court of Appeal has affirmed a libel judgment against author Gwen Davis and Doubleday and Company, the publisher of her novel *Touching*. The action was filed by Paul Bindrim, a clinical psychologist who alleged that *Touching* portrayed him, and depicted a nude encounter session led by him, in a defamatory manner.

Davis had in fact attended a nude encounter session conducted by Bindrim before she wrote her novel, and *Touching* did in fact depict a nude encounter session. In

his lawsuit, Bindrim alleged that he was defamed by the novel, because the leader of the novels nude encounter session used obscene language, which Bindrim said he did not use, and because of the novel's inaccurate portrayal of what actually happened at the encounter session attended by Davis.

Though libel lawsuits are common, this case appears to be one of the few involving libel by a work of fiction. Davis contended that the complained of character in her novel, Dr. Simon Herford, was completely fictional and was not Bindrim at all. Simon Herford was described in *Touching* as a "fat Santa Claus type with long white hair, white sideburns, a cherubic rosy face and rosy forearms." Bindrim, on the other hand, was clean shaven and had short hair. Simon Herford was said to be a psychiatrist, while Bindrim was a psychologist. Despite these differences, a majority of the Court of Appeal found, in an opinion written by Justice Robert Kingsley,

that “the character Simon Herford was very similar to the actual plaintiff [Bindrim]” and that there was “overwhelming evidence that plaintiff and ‘Herford’ were one.”

This case is especially interesting, because the conclusion that Bindrim and Simon Herford “were one” was disputed not only by Gwen Davis and her publisher, but also by a dissenting judge of the Court of Appeal. Presiding Justice Gordon Files wrote in his dissent, “Defendants’ novel describes a fictitious therapist who is conspicuously different from plaintiff, in name, physical appearance, age, personality and profession. Indeed, the fictitious Dr. Herford has none of the characteristics of plaintiff except that Dr. Herford practices nude encounter therapy.”

Given this marked disagreement over whether the novel’s character was in fact Bindrim, a key legal issue in the case is the legal test to be used in determining

whether a fictional character and a real person are the same. Davis and her publisher contended that because *Touching* was labeled as being a “novel,” it could not be claimed that the characters in the book were actual people, rather than merely fictional characters. The Court of Appeal disagreed, however. It held that “The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described.”

There was also marked disagreement concerning whether the novel defamed Bindrim (assuming Bindrim was identified as the Simon Herford character). The Court of Appeal ruled that it was clear that some of the incidents portrayed in the novel were false, because they were a substantially inaccurate description of what actually happened. The court also held that it was clear that some of these portrayals cast Bindrim in a disparaging light, because they portrayed his language and conduct

as crude, aggressive and unprofessional. Indeed, Justice Bernard Jefferson, in a concurring opinion wrote, “I fail to see how any jury or any court could consider such crude vulgarity as not defaming a professional therapist to whom such vulgarity was attributed in the practice of his profession.” On the other hand, Justice Files, in his dissent, wrote that while “Some of the therapeutic techniques described in the quoted passages may seem bizarre, . . . a court cannot assume that such conduct is so inappropriate that a reputable therapist would be defamed if that technique were imputed to him.”

Bindrim admitted that he was a public figure, and that therefore he was required to prove that Davis and Doubleday acted with “actual malice,” that is, with knowledge that the novel was false, or with reckless disregard for its truth. The court found that Davis’ reckless disregard for the truth was apparent from her knowledge of

what actually transpired at the encounter session she had attended.

Although the court found that Doubleday did not have actual malice when it published the hardback edition of *Touching*, the court held that it did act with reckless disregard for the truth when it later licensed a paperback edition of the book, because by that time it had received a letter of complaint from Bindrim's lawyer. Although Davis had assured Doubleday that Herford was not Bindrim, the court ruled that her assurance was not sufficient after Doubleday received the letter from Bindrim's lawyer. "At that point," the court held, "Doubleday either had serious doubts, or should have had serious doubts, as to the possibility that plaintiff was defamed by 'Touching' and ... at that point Doubleday had some duty to investigate."

In his dissenting opinion, Justice Files highlights what appears to be the insoluble problem created by this

conclusion: “The majority opinion adopts the position that actual malice may be inferred from the fact that the book was ‘false.’ That inference is permissible against a defendant who has purported to state the truth. But when the publication purports to be fiction, it is absurd to infer malice because the fiction is false. . . . From an analytical standpoint, the chief vice of the majority opinion is that it brands a novel as libelous because it is ‘false,’ i.e., fiction, and infers ‘actual malice’ from the fact that the author and publisher knew it was not a true representation of plaintiff.”

Although judgment for Bindrim was affirmed on his libel cause of action, Davis did prevail on one aspect of the case. At the time she registered for Bindrim’s nude encounter session, she signed an agreement not to write about what transpired. Thus, when Bindrim filed suit, he sued not only for libel, but also for breach of contract. The jury awarded him \$12,000 in damages on his

contract claim, but the trial judge struck that portion of the award. On this issue, the Court of Appeal affirmed, saying, “We are aware of no authority that a professional person can, by contract or otherwise, prevent one of his patients from reporting the treatment that patient received. Since the whole theory of plaintiffs therapy was that of group encounter, what [Davis] saw done to and by other members of the group was part of her own treatment. She was free to report what went on. The limits to her right to report were those involved in the libel counts. Plaintiff has no separate cause of action for the mere reporting.”

Davis and Doubleday petitioned the California and United States Supreme Courts for a hearing. The Writers Guild of America has filed a brief in their support. However, both Supreme Court denied the petitions.

Bindrim v. Gwen Davis Mitchell, 91 Cal.App.3d 61, modified, 92 Cal.App.3d 869 (1979) [ELR 1:4:1]

NBC broadcast of Universal movie Tail Gunner Joe did not defame or invade privacy of Roy Cohn

The Appellate Division of the New York Supreme Court has held that an NBC broadcast of “Tail Gunner Joe,” the Universal movie about the late Senator Joseph McCarthy, did not defame or invade the privacy of Roy Cohn or David Schine, McCarthy’s former aides and advisors, or the law firm in which Cohn is now a partner.

Cohn and Schine claimed that the use of their names in advertising the movie and in having actors portray them against their wishes constituted an invasion of their

privacy. The court held, however, that the subject of the movie was still a matter of public interest, and that unless the advertising was false or published with reckless disregard for the truth, or unless the selection of actors was done in a defamatory manner, New York's Right of Privacy statute was not violated.

Cohn and Schine also contended that the movie defamed them because it contained references to "book burning" in certain American overseas information libraries, and viewers might conclude that they were among the book burners. The court found, however, that although Cohn and Schine were portrayed as discovering the presence of allegedly subversive works in those libraries, they were not depicted as participating in any book burning campaigns, nor did they claim that any of the factual statements made in the book burning segment were untrue.

Moreover, said the court, “To the extent that the film suggests plaintiffs may have some political responsibilities for the character and consequences of the investigation of the overseas libraries and the climate which occasioned book burnings, it is not actionable in the absence of proof of falsity in reporting the facts on which the conclusion is based. Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided (as here) that the facts supporting the opinions are set forth.”

Cohn and Schine also complained that the movie did not make a “balanced presentation.” The court held this to be essentially a matter of editorial judgment and not libelous. The court thus found that Cohn and Schine had not been defamed. Even if, as they contended, the film unnecessarily distorted McCarthy’s career and was disparaging to him, that would not give rise to a derivative defamation claim by them.

In addition, the court held that even if the movie were defamatory, Cohn and Schine were public figures, despite their return to private life, and thus they would have to prove actual malice, that is, knowledge that the movie was false, or reckless disregard for the truth. Said the court, “So far as appears, there is no showing of falsity and no showing that the film was composed and thereafter exhibited with actual malice.”

Finally, there had been no showing that Cohn, Schine or Cohn’s law firm had suffered any damages at all. Accordingly, their complaint was dismissed.

Cohn v. National Broadcasting Co., Inc., 414 N.Y.S.2d 906 (1979) [ELR 1:4:2]

Twentieth Century-Fox did not breach release agreement by licensing movie Roger Touhy, Gangster to CBS

The Appellate Court of Illinois has sustained the dismissal of a complaint filed by Roger Touhy, Jr. which alleged that Twentieth Century-Fox breached a release agreement by licensing a film about his father entitled “Roger Touhy, Gangster” to CBS for television broadcast in the United States.

In 1944, Roger Touhy, Sr. filed suit against Twentieth Century-Fox, alleging that the movie defamed him. The case was settled; Touhy, Sr. received \$15,000 and executed a release of all claims arising out of the production, distribution and exhibition of the movie. A clause allowing Twentieth Century-Fox to exhibit the picture “outside the territorial limits of the continental United

States” also appeared in the release. There was no mention of the film’s showing in the United States.

On August 20 1975, the movie was aired by CBS. On February 5, 1976, Roger Touhy, Jr. filed suit for breach of contract. Touhy alleged that the clause in his father’s release which permitted the film to be exhibited outside of the United States implied a promise on the part of Twentieth Century-Fox not to show the film within the country. Twentieth Century-Fox countered with a Motion to Dismiss for failure to state a cause of action. It contended that the release was a unilateral contract which operated only to dismiss the libel suit brought by Roger Touhy, Sr., and that “the release did not contain an agreement on its part not to distribute the film in the United States.”

The Appellate Court of Illinois agreed with Twentieth Century-Fox. The court noted that “since a release is a contract, the interpretation and construction of it is

governed by the rules of contract law.” The court then held that the release in question was a “clear and unambiguous document,” and therefore it could not “add covenants to a contract simply to reach what may appear to be a more equitable result. . .” The court thus concluded that once Twentieth Century-Fox paid Touhy, Sr. \$15,000, all of its contractual obligations arising from the release had been met.

Roger Touhy v. Twentieth Century-Fox Film Corporation, 387 N.E.2d 862 (Ill.App. 1979) [ELR 1:4:3]

Television network and station win separate defamation cases arising out of news broadcasts; no libel found in one case and due care found in the other

NBC and an Oklahoma television station have won unrelated though similar defamation lawsuits arising out of news broadcasts.

The NBC case was filed by 46 South Dakota ranchers who alleged that statements made by reporter Fred Briggs on the NBC Nightly News, during coverage of the 1973 “occupation” of Wounded Knee, were libelous. Briggs’ statements concerned land leasing practices on the Pine Ridge Indian Reservation. The ranchers contended that viewers might conclude that the ranchers had taken unfair advantage of the land’s Indian owners and were thus responsible for the Indians’ subwelfare level of living.

A federal Court of Appeals held that the statements made by Briggs were not defamatory, because none of them involved any direct derogatory remarks about any of the ranchers or any group of ranchers who leased land from Indians. The ranchers also had failed to plead any special or specific damages. Summary judgment in favor of NBC was therefore affirmed.

The second case involved a television report about a robbery investigation in which the plaintiff was mentioned as a suspect. In fact, the plaintiff had not been involved in the robbery.

Because the plaintiff was not a public figure, and had not in fact injected himself into a matter of public interest, the primary issue in this case was the standard of care that should have been exercised by the television station. Relying primarily on Oklahoma law, the Oklahoma Court of Appeals held that the station should have exercised “that degree of care which ordinarily prudent

persons engaged in the same kind of business usually exercise under similar circumstances.” The court emphasized that this standard requires the recognition of “the peculiar needs of the electronic and print media. . . The need to report matters as quickly as possible is not merely good competition but serves a paramount concern of society to have access to information of public concern as soon as possible.”

Reviewing the facts of this case, the court found that the station’s reporter did have a reasonable basis for his report implicating the plaintiff, even though the plaintiff had not in fact been involved. At least some (though not all) law enforcement officials had mentioned the plaintiff as being the suspect under investigation. Said the court, “The reporter noted what he observed, was reasonably faithful to those observations, and displayed no indifference or negligence regarding their accuracy.”

Because the standard of due care required of the media was met in this case, the court affirmed a summary judgment in the station's favor.

Glover v. National Broadcasting Co., Inc., 594 F.2d 715 (8th Cir. 1979); Benson v. Griffin Television, Inc., 593 P.2d 511 (Okl.App. 1979) [ELR 1:4:3]

Federal Court of Appeals reinstates breach of contract suit by theater owner against distributor of movie of fight between Muhammed Ali and Ken Norton

A federal Court of Appeals in New York has reversed the dismissal of a breach of contract lawsuit filed by Budco, Inc., the owner of a number of movie theaters in

the Philadelphia area, against The Big Fights, Inc., a distributor of boxing films.

In 1976, Budco and Big Fights entered into a license agreement permitting Budco to exhibit the official motion picture of the heavyweight championship fight between Muhammed Ali and Ken Norton held on September 28th of that year. The agreement provided that there would be no network home television of the fight until after November 18, 1976. Later, it was agreed that the date before which there was to be no network home television would be four weeks earlier, October 21st, in exchange for which the licensing fee was reduced by half, from \$16,500 to \$8,250.

Budco contended that both it and Big Fights recognized that any public announcement of a proposed network home broadcast of the fight would destroy the commercial value of the licensing contract. Nevertheless, as early as September 19th, October 2nd, and

October 3rd, 1976, the CBS station in Philadelphia made public announcements that the fight would be shown in its entirety over network home television on October 22, 1976. Budco alleged that during some of those announcements, Round 15, allegedly the most controversial round of the fight, was shown in its entirety. Budco claimed that as a result of those broadcasts, the commercial value of the exhibition of the motion picture was destroyed and that it had lost over \$10,000 in unrecovered advertising costs.

Budco filed suit against Big Fights on the theory that Big Fights had breached the licensing agreement, or, alternatively, on the theory that the purpose of the agreement had been wholly frustrated as a consequence of the CBS announcements.

A federal District Court in New York City dismissed Budco's contract claim because it failed to allege a

breach by Big Fight. (It also dismissed the frustration of purpose claim for lack of subject matter jurisdiction.)

The Court of Appeals reversed, however. It ruled that Budco had advanced “two potentially meritorious arguments”: (1) that the use of the film clip of Round 15 by CBS constituted a showing “of the fight” in violation of the licensing agreement; and (2) that Big Fights had breached its covenant of good faith and fair dealing, implied in all contracts, that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”

The Court of Appeals held that televising a substantial and controversial part of the fight as an advertisement could conceivably constitute a violation of the provision that there would be no network home television of the fight until after a certain date. And “Even if the provision restricting home television is not treated as a strict

warranty,” the Court of Appeals also held, “Budco might be able to show that there was an agreement between Big Fights and CBS whereunder Big Fights could control the television advertising dates.”

The case has therefore been sent back to the District Court for further proceedings.

Budco, Inc., v. The Big Fights, Inc., 594 F.2d 900 (2d Cir. 1979) [ELR 1:4:4]

Courts disagree about whether alleged copyright infringers are entitled to a jury trial in cases where BMI sought only statutory damages and injunctions; antitrust defense permitted in one case; summary judgment granted in similar but unrelated case

A defendant's request for a jury trial has been denied in a copyright infringement action brought by Broadcast Music, Inc. against Papa John's, Inc., involving the alleged unauthorized public performance for profit of copyrighted musical compositions. A federal District Court in Indiana has held that BMI's demand for statutory damages (in lieu of actual damages or Papa John's profits) in addition to an injunction restraining further infringement did not entitle Papa John's to a trial by jury, because such damages are "equitable" rather than legal.

The court noted that the Copyright Act does not deal explicitly with the right to trial by jury in infringement actions. However, the United States Supreme Court has characterized an award of discretionary statutory damages as "nonpunitive." Statutory damages, according to the court, were provided by Congress to create a remedy where actual damages and profits are not provable, even though a copyright has been infringed. The court also

pointed out that the Copyright Act gives the court broad discretion in awarding statutory damages. The court found it to be unlikely that juries would be given such discretion in the absence of proof of actual damages. And in view of the traditionally equitable character of copyright infringement actions involving statutory damages, the court granted BMI's motion to strike Papa John's request for a jury trial.

In a separate suit filed by BMI against Moor-Law, Inc., a federal District Court in Delaware has held that antitrust violations may be asserted as a defense to a claim of copyright infringement. This case involved the alleged public performance of copyrighted musical compositions written by, among others, Waylon Jennings, Tompall Glaser and Willie Nelson. As in the Papa John's case, BMI sought an injunction barring continued infringement and statutory damages (in lieu of actual damages or profits).

In this case, however, the defendants claimed that BMI and the songwriters involved had pooled and tied their copyrights in violation of Sections 1 and 2 of the Sherman Act which the defendants asserted as a defense and as a class action counterclaim.

The court held that the alleged misuse of copyrights could constitute “unclean hands,” and could be raised as a defense to a claim of copyright infringement where injunctive relief was sought. The court refused to sever BMI’s copyright infringement claims from the defendants’ antitrust claims, because of the possible overlap of evidence.

In apparent disagreement with the Papa John’s case, the court in the case against Moor-Law denied BMI’s motion to strike Moor-Law’s request for a jury trial. Without extensive analysis, the court held that a jury trial must be granted when legal issues are raised, even if such issues are incidental to the equitable relief

sought. Because BMI had requested statutory damages, which the court characterized as a “legal remedy,” the court found that the evidence supporting an award of damages would have to be submitted to a jury.

In a third case filed by BMI involving the alleged unauthorized public performance for profit of copyrighted musical compositions, a federal District Court in Michigan granted BMI’s motion for summary judgment on the question of liability only. BMI’s motion was based on affidavits of its agents establishing that the musical compositions in question had been performed in the defendant’s lounge, and on the defendant’s response to Requests for Admissions filed by BMI. (Actually, the defendant had refused to admit the facts requested by BMI, but the court found the refusals to be insufficient and deemed them admitted.) In addition, the defendant never denied that the allegedly infringing performances occurred. Thus, on the basis of the admissions and

affidavits on file, the court concluded that the defendant was liable for copyright infringement and that no issues of material fact were raised requiring a trial.

Broadcast Music, Inc. v. Papa John's, Inc., 201 USPQ 302, CCH Copyright Law Reporter, Para. 25,059 (N.D. Ind. 1979); Broadcast Music, Inc. v. Moor-Law, Inc., 1979-1 CCH Trade Cases, Para. 62,510; CCH Copyright Law Reporter, Para. 25,056 (D.Del. 1978); Broadcast Music, Inc. v. Marshall, 201 USPQ 30, CCH Copyright Law Reporter, Para. 25,072 (E.D. Mich. 1978) [ELR 1:4:5]

Dallas Cowboys Cheerleaders obtain preliminary injunction barring showing of movie *Debbie Does Dallas*

The Dallas Cowboys Cheerleaders, Inc. have obtained a preliminary injunction prohibiting the distribution, exhibition and advertising of the movie “Debbie Does Dallas” by the Pussycat Cinema. A federal District Court in New York City found that the Dallas Cheerleaders’ uniform was a valid trademark and service mark and that the display of the uniform in the movie and in advertising for the movie constituted a violation of Section 43(a) of the Lanham Act and Section 368-d of the New York General Business Law (New York’s Anti-dilution Law).

The film, which according to the court had “no other purpose than to display sex acts in minute detail,” featured a character appearing in a uniform which closely

resembled a Dallas Cheerleader uniform. The theater marquee and newspaper advertising also displayed the uniform and incorrectly referred to an actress in the film as an ex-Dallas Cowgirl Cheerleader.

In response to the Dallas Cheerleaders' claims of trademark and service mark infringement, Pussycat Cinema contended that the uniform was not a valid trademark or service mark, that the film was a parody or satire on female cheerleaders, and that the right to show the film included a right to advertise it.

The court found that the Dallas Cheerleader uniform was a valid trademark because its color, design and ornamentation were "distinctive and arbitrary" and not solely functional, and because the uniform had acquired a secondary meaning by its close association with the Dallas Cheerleaders.

The court rejected the defendant's contentions that the film was a parody or satire and that the copyright

doctrine of “fair use” also would preclude liability for trademark infringement. Although the defense of fair use has been applied in several trademark cases, Judge Griesa refused to apply it in this case, because he found that “Debbie Does Dallas” was not a parody or satire because “the purpose of the movie [had] nothing to do with humor.”

The court found that the movie and its advertising were intended to exploit the popularity of the Dallas Cheerleaders. The public might conclude that the film was sponsored by the Dallas Cheerleaders or that members of the group participated in the film. And any continued exhibition or advertising of the film would create irreparable harm to the Dallas Cheerleaders, because of the possibility of “widespread confusion in the public mind as to the association of plaintiff and its cheerleaders with pornographic films.”

Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F. Supp. 366 (S.D.N.Y. 1979) [ELR 1:4:5]

Jockey denied workmen s compensation benefits due to status as independent contractor

A professional jockey who was injured in an accident during a horse race has been denied workmen's compensation benefits from the owner of the horse. The Commonwealth Court of Pennsylvania has upheld a decision of the Pennsylvania Workmen's Compensation Appeal Board that the jockey was an independent contractor, rather than an employee, and thus was not entitled to such benefits. The court considered the following factors to be significant: the jockey controlled the manner in which the horse was ridden during the race; the jockey's pay was determined by the results of the race;

great skill was required; the jockey supplied his own saddle and other equipment; and payment was by the job and not by time.

The court pointed that in Pennsylvania the burden of proof was on the jockey to establish an employer-employee relationship. In California, where the burden has been placed on the employer to establish an independent contractor relationship, a jockey has been found to be an employee and thus entitled to worker's compensation benefits. *Isenberg v. California Employment Stabilization Commission*, 30 Cal.2d 34,180 P.2d 11 (1947).

Davidson v. Workmen's Compensation Appeal Board, 399 A.2d 1193 (Pa. Comwlth. 1979) [ELR 1:4:6]

Hockey spectator injured by flying puck may be able to recover compensation for injuries

In 1973, Virginia Parsons was struck by a flying puck while returning to her seat after the intermission of a hockey game in Waterloo, Iowa. She brought a tort action against the National Dairy Cattle Congress (owner of the auditorium in which the game was played), the City of Waterloo (lessee of the auditorium) and Black Hawk Enterprises, Inc. (owner of the local hockey club).

Parsons alleged that her injuries were proximately caused by the defendants' negligent failure to provide her with a safe place from which to watch the game, and by their negligent failure to erect "barriers or other obstacles" to protect her from errant hockey pucks. The defendants contended that she had assumed the risk of

such an injury and had been contributorily negligent, and they moved for summary judgment.

The trial court agreed with the defendants' contention that Parsons had assumed the risk of injury as a matter of law and granted their motion on that basis. The Supreme Court of Iowa has held, however, that the trial court erred, and has sent the case back to the lower court for trial.

The high court first pointed out that summary judgment may be awarded only when there is an absence of any genuine issue of material fact. The court then reviewed the trial court's decision to grant summary judgment on the basis of the assumption of the risk defense. The court defined "assumption of the risk" as "an alternative expression for the proposition that defendant was not negligent, i.e., either owed no duty or did not breach the duty owed."

The court found it to be “plain that . . . these owners and operators of the arena owed Parsons a duty.” The court noted that while a possessor of land is not generally liable to his invitees for physical harm caused by activities or conditions on the land whose danger is known or obvious to them, “there are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee, notwithstanding its known or obvious danger.” In such cases, including this case, the court ruled that the possessor owes the invitee a duty of reasonable care which may require warnings or other affirmative steps. The court noted that a proprietor of a place of public amusement or entertainment is held to a stricter account for injuries to patrons than the owner of private premises generally. He is not an insurer of the safety of patrons but owes them only what, under the particular circumstances, is ordinary and reasonable care.

The court next considered whether the defendants as a matter of law had satisfied their respective duties. The court apparently saw no reason to distinguish between the defendants: “In almost all cases this question of due care [of the owner or the operator of a place of amusement], under the circumstances, is a question for the jury. . . Even evidence of compliance with what is customary will not make negligence an issue of law for the court rather than one of fact for the jury.”

Several other cases have held that, as a matter of law, hockey entrepreneurs did not breach their duty to spectators by failing to warn of or protect against the open and obvious danger of errant pucks. However, the Iowa Supreme Court held that those cases were not controlling, because in those cases the injured parties were seated spectators, well aware of play, while in this case Parsons was a patron in the aisle, unaware that play had resumed.

Thus, the court concluded that the defendants were not entitled to summary judgment, because there was a genuine issue of material fact for trial: whether due care requires a warning or protection for persons, moving in the aisles, whose attention may be diverted and whose vision may be obscured.

Parsons v. The National Dairy Cattle Congress, 277 N.W.2d 620 (Iowa S.Ct. 1979) [ELR 1:4:6]

Baseball umpires could not compel bargaining by Major Leagues, because of zipper clause in collective bargaining agreement

The Major League baseball umpires' strikes of 1978 and 1979 are now history. But a just published Memorandum of Advice received by the National Labor

Relations Board from Harold J. Datz, its Associate General Counsel, provides interesting insight into the effect of a “zipper clause” in a collective bargaining agreement.

The Major League Umpires Association entered into a collective bargaining agreement with the American and National Leagues in 1977 that was to have remained in effect until 1981. The agreement contained a “zipper clause” providing: “The parties agree that they have bargained fully with respect to all proper subjects of collective bargaining and have settled all such matters as set forth in this Agreement.”

In August of 1978, the Umpires Association requested bargaining over 21 subjects, some of which were covered by the collective bargaining agreement, others of which had been discussed during negotiations, and others which had never before been mentioned. The American and National Leagues refused to negotiate with the

Umpires Association regarding any of the 21 subjects. Thus, on August 25 1978, the Umpires Association went on strike. The American and National Leagues quickly obtained a temporary restraining order and preliminary injunction against the strike, and the umpires returned to work (until the 1979 season).

Shortly before the 1978 strike, the Umpires Association filed a “refusal to bargain” charge with the National Labor Relations Board (pursuant to section 8(a)(5) of the National Labor Relations Act). It was in connection with this charge that the National Labor Relations Board requested the just published Memorandum of Advice.

In his memorandum, Associate General Counsel Datz advised the NLRB that the charge filed by the Umpires Association should be dismissed. According to the Memorandum, the “zipper clause” indicated an intention on the part of the Umpires Association and the Major Leagues to treat all bargainable subjects as having been

“bargained fully,” even if some of those subjects were not in fact discussed at all. The rationale and intention of the “zipper clause” was said to be this: because each party had the opportunity to raise any bargainable subjects during negotiations, further bargaining on those subjects was to be closed until the commencement of bargaining for the next contract. Until that time, the collective bargaining agreement was to constitute the “code of the shop” and was to stabilize the employment relationship.

According to the Memorandum, the conclusion that the Umpires Association could not force bargaining over the 21 subjects during the term of the existing collective bargaining agreement furthers the basic federal labor policy of promoting industrial peace as well as contract stability. If a contrary conclusion were reached, the result could be chaos. There are innumerable subjects over which either party could constantly be requesting

bargaining. Thus, it is possible that the parties' contract could always be in a state of flux.

The Memorandum distinguished this case from those in which an employer unilaterally changes a term and condition of employment which is not contained in a collective bargaining agreement, and then refuses to bargain about that change. In such cases, a zipper clause is not ordinarily construed to permit an employer to unilaterally change terms and conditions of employment without bargaining. In this case, however, the Memorandum concluded that the Major Leagues were using the zipper clause "as a shield to protect against a bargaining demand and not as a sword to justify a change."

American and National Leagues of Professional Baseball Clubs, Case No. 4-CA-95 86, 1978-79 CCH NLRB Para. 20,224 (1978) [ELR 1:4:7]

Advertising agency's purchase of materials in preparation of mechanicals is subject to New York state sales tax

New York state law imposes a tax on the “receipts” of every retail sale of “tangible personal property” except sales for “resale.” The Appellate Division of the New York Supreme Court has held that an advertising agency’s purchase of materials used in the preparation of “mechanicals” is not a purchase for “resale,” and thus is subject to the tax. “Mechanicals” are pieces of art with type or reproductions pasted on them and are facsimiles of completed advertisements. Photo negatives are made of “mechanicals” and those negatives are then sent to the advertising media.

Laux Advertising, Inc., the agency which initiated this action, did not pay sales tax on the materials it

purchased to prepare “mechanicals” for its clients’ ads. Instead, its clients paid sales tax on the finished “mechanicals.”

The State Tax Commission determined that the advertising agency was liable for sales taxes on the materials it had purchased to use in the preparation of “mechanicals,” and the court agreed.

The court held that the “mechanicals” were for use within the advertising business and not for resale to customers, because the agency utilized the “mechanicals” for placing advertisements in publications for its clients and any resales were merely incidental.

Laux Advertising, Inc. v. Tully, 414 N.Y.S.2d 53 (Sup. Ct. App. Div. 1979) [ELR 1:4:8]

DEPARTMENTS

In the Law Reviews:

Copyright Implications Attendant Upon the Use of Home Videotape Recorders, 13 University of Richmond Law Review 279-295 (Winter 1979)

Divisibility of Copyright: Its Application and Effect, 19 Santa Clara Law Review 171-194 (Winter 1979)

Use of Audiovisual Recording and Presentation Systems, 58 Nebraska Law Review 467-493 (1979)

Divisibility of Copyrights: A Bill of Rights for Authors by Michael A. Tenzer, 14 California Western Law Review 590-631 (1979)
[ELR 1:4:8]