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A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. Three Point Shot brings you the latest in sports law-related news and provides you with links to related materials.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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Referee Seeks Reversal of Call Dismissing Tort Claims Against Sports Radio Hosts Over Trolling Campaign

Following a bitter 75-73 loss by the University of Kentucky at the hands of the University of North Carolina in a 2017 NCAA Men's Basketball Tournament "Elite Eight" game, the familiar trope of blaming the officials reached a boiling point when angry Kentucky fans targeted one of the referees in a sustained cyberattack, or trolling campaign.

Kentucky fans laid blame for the defeat on what they considered bad officiating, including disputed calls by one of the game referees, plaintiff John Higgins ("Higgins" or "Plaintiff"). In the ensuing days, a number of fans from Big Blue Nation crashed the chat boards of the defendant, Kentucky Sports Radio, LCC ("KSR"), by phoning and emailing radio call-in shows about the game and specifically voicing their displeasure with the plaintiff's officiating. Moreover, two show hosts, Matthew Jones and Drew Franklin (the "Hosts") added their own scathing commentary about the game and Higgins' calls during post-game shows and in blog posts and articles published on KSR sites (which garnered multiple comments from fans). Beyond the X's and O's of the game, the Plaintiff alleged that the KSR Hosts also encouraged the actions of a certain group of fans who had begun an online and offline cyberattack against Higgins and his roofing business. The Plaintiff further alleged that the Hosts, in a bit of double dribble, implicitly encouraged the trolling behavior while at the same time pleading restraint for fans to be respectful.

The KSR Hosts' coverage allegedly included discussion of a video that had been circulated among several fan sites and highlighted Higgins' calls in the game and also shared Higgins' business contact information, according to plaintiff, so fans could troll Higgins' roofing business. The roofing business subsequently received a flood of one-star reviews, false complaints to the Better Business Bureau, and other negative comments that led other media outlets to cover the story. Anonymous fans also purportedly left threatening messages at his home. According to the Complaint, the entire post-game full court press against Higgins by certain anonymous fans of Big Blue Nation was damaging to the referee, his family, and his roofing business and prompted police to patrol the area surrounding his home.

In October 2017, Higgins filed claims against KSR and the Hosts for, among others, intentional infliction of emotional distress, invasion of privacy, and tortious interference with a business relationship or expectancy.

Higgins claimed that KSR and the Hosts indirectly recruited an army of willing and upset fans to launch an attack against himself and his business in retribution for the officiating in the Elite Eight game. While the referee admitted that the Hosts told their listeners not to contact or troll the referee, Higgins claimed that such efforts to box out the onslaught of angry fans were disingenuous at best, especially since Higgins claimed the Hosts had already stoked their listeners' ire. In short, the referee sought to impose tort liability on KSR and its Hosts for the content of their broadcast and online reporting relating to his game calls and the viral internet storm that resulted in the negative reviews, threats and invasion of privacy. In their defense, KSR and the Hosts contended that their post-game criticism of Higgins was protected speech under the First Amendment and that any claims related to it were barred.

In March 2019, a Kentucky district court dismissed the suit, ruling that the KSR radio Hosts' statements were made in a public forum and on "matters of public concern" and were therefore protected by the First Amendment (and that "general principles of common decency and journalistic ethics was not an appropriate consideration for this Court"). (*Higgins v. Kentucky Sports Radio, LLC*, No. 18-043 (E.D. Ky. Mar. 20, 2019)). The lower court found that if it were to hold the KSR Hosts accountable for third party actions it could possibly reduce the free flow of public debate on public events and issues. Since the court found that the KSR radio Hosts actions did not count as "incitement" of the attacks made against the referee, his wife and his business, they were therefore entitled to First Amendment protection. When the buzzer sounded, the court sympathized with the plaintiff, but ultimately held that the KSR Hosts' speech was protected: "[W]hile Plaintiffs' frustration is understandable and their damages are real, in some instances the First Amendment…provides special protection to speech on matters of public concern, even if that speech is revolting and upsetting."

Following the defeat, Higgins filed an appeal with the Sixth Circuit (*Higgins v. Kentucky Sports Radio, LLC*, No. 19-5409 (6th Cir. filed Apr. 22, 2019)). In June 2019, Higgins filed his appellant brief and argued that the KSR Hosts encouragement of lawless, tortious action is not protected by the First Amendment, and that even if those statements were covered by the First Amendment, the KSR Hosts personal vendetta against Higgins was not a matter of public concern, as required for greater First Amendment protection. In response, in July 2019, KSR filed its opposition brief and urged the 6th Circuit not to revive the suit, stating that it is "nothing more than an attempt to stifle protected speech." The KSR Hosts also pointed out that the referee has not sued any other media outlet that covered the events following the game at issue in 2017. Whether the lack of suit against other media outlets plays a role in the Sixth Circuit's decision remains to be seen as we wait to see whether Higgins can overturn the dismissal of his suit.

New York Attorney General Requires Clearer View of Playing Field for Fans Seeking Tickets

The New York State Attorney General's office announced a "big ticket" settlement this past July against two ticket resellers alleged to have engaged in the sale of "speculative tickets," or offering to sell tickets they didn't yet own without adequate disclosures (*In re: TicketNetwork Inc.*, No. 451858/2018 (N.Y. Sup. Ct., Consent and Stipulation July 12, 2019)). In July, a judge approved a consent order requiring that TicketNetwork Inc. ("TicketNetwork"), Eventvest, Inc. d/b/a Ticket Galaxy ("Ticket Galaxy"), and Donald Vaccaro (the owner of both businesses, collectively the "Defendants" or "Resellers") pay $1.55 million to settle the enforcement action brought by the Attorney General, and provide certain disclosures when the brokers do not have possession of the tickets up for sale. Going forward, fans looking for tickets to the big game will have a clearer view of the playing field when browsing for tickets at these (and perhaps other) brokers' sites.

In announcing the settlement, the Attorney General indicated that New Yorkers have spent over $37 million on tickets sold through TicketNetwork's speculative tickets programs between 2012 and 2018. Numerous complaints over inflated secondhand ticket prices prompted an extended investigation by the New York Attorney General's office, resulting in a report in 2016 and enforcement actions, including the TicketNetwork complaint.

According to the Attorney General, the Defendants and other select ticket brokers using the TicketNetwork platform would list tickets to popular sporting events and concerts, but, in some cases, did not have possession of the tickets or even have a contractual right to obtain them. The complaint alleges that the resellers would often list these tickets for events before the tickets had even been released for sale to the public, misleading the public to believe that defendants had access to the tickets, thereby driving up demand and charging high premiums that greatly exceeded the listed ticket price. After completing a sale of the "ticket" to a consumer, the defendants would purchase the ticket from another vendor, ideally at a lower price, and keep the difference. Worst of all for consumers, the Attorney General claimed that "speculative ticket listings on the [reseller's] platform are, in all relevant ways, indistinguishable from listings for real tickets," and consumers could not tell whether they are buying a ticket that actually existed. The complaint also alleged that the Resellers went to great lengths to hide the practice and routinely lied to customers when they could not obtain tickets in the particular stadium section offered (or could not obtain any tickets at all), trotting out excuses such as "technical errors" or "supplier" issues. In all, the Attorney General stated that the resellers engaged "in a massive scheme to trick tens of thousands of unsuspecting consumers into buying tickets to concerts, shows, and other live events that the sellers did not actually have," labelling such practice as "deceptive" and a violation of New York law.

This settlement was the final round in a back-and-forth contest between the State and the Defendants, beginning with the Resellers first filing declaratory judgement actions in September 2018 against the Attorney General after her

office had threatened to bring a civil action against the defendants, seeking a judicial determination that their speculative ticket selling practices were "by the book." (See *TicketNetwork, Inc. v. Underwood*, No. 158291/2018 (N.Y. Sup. Ct.); *Eventvest, Inc. d/b/a Ticket Galaxy v. Underwood*, No. 158292/2018 (N.Y. Sup. Ct.)). The defendants argued that the practice is known as "drop shipping" in other industries, and is a common business practice to offer products for sale when the seller does not yet have such products in its possession. Moreover, the defendants claimed that they made adequate disclaimers that tickets listed for sale by ticket brokers on the TicketNetwork platform might not be "in hand" when listed and that it was "extremely rare" when a seller was unable to fulfill an order.

Not taking the defendants' claims at face value, the Attorney General responded to the declaratory judgement actions by bringing an action in September 2018 over the speculative ticket sales, claiming that such practices were deceptive and misleading under consumer protection laws. (*People of the State of New York v. TicketNetwork, Inc.,* No. 451858/2018 (N.Y. Sup. Ct. filed Sept. 14, 2018)). The Attorney General also alleged that defendants engaged in false advertising and violated provisions of the New York's Arts and Cultural Affairs Law § 25.23, which puts in place certain requirements for online secondary ticket resellers, such as requiring conspicuous posting of the ticket list price and the price charged by the broker. Incidentally, Section 25.10 of the law expressly prohibits the sale of speculative tickets unless it is accompanied by "clear and conspicuous" disclosures to the consumer.

With both parties apparently wishing to avoid the prospect of attending the live show of a trial, the matter was settled.

Pursuant to the consent order, the Resellers agreed to pay $1.55 million and undertake certain transparency measures to better inform consumers about speculative ticket sales. However, if one reads the fine print on the back of the settlement papers, the Defendants did not expressly agree to stop the practice of selling speculative tickets. Specifically, the consent order distinguishes between the resale of in-hand tickets or ("Ticket Offerings") and the resale of tickets that are not in hand (called "Service Offerings"), and requires the Resellers to refrain from making Service Offerings that are "deceptive or misleading" and use certain labels differentiating Service Offerings and Ticket Offerings. The Resellers are also prohibited from indicating that tickets are in hand when they are not, and are required to conspicuously disclose when they do not have possession of the tickets for sale (and otherwise comply with Arts and Cultural Law § 25.10). Further, the consent order requires that the consumer confirm having received such a disclosure before completing a transaction. The Resellers also agreed to be truthful when responding to client inquiries regarding the filling of ticket orders or speculative ticket practices.

The consent order will give consumers a better vantage point to understand what kind of tickets they are buying from the Defendants and may indirectly usher in more transparent practices from other brokers' practices as well. Yet, the settlement leaves the defendants' secondhand ticket box office open, and it

remains to be seen whether the enforcement action will have any impact on prices for secondhand tickets for certain big events in the future.

County Sidesteps Liability for Triathlon Accident Caused by Actions of Volunteer Traffic Officer

Allison Ewart ("Ewart") was struck by a car on September 15, 2012 while competing in the second leg, or cycling portion, of the Malibu Triathlon. Widge Galloway ("Galloway"), a volunteer traffic control officer for the County of Los Angeles ("the County"), failed to see Ewart as she approached the intersection of Lunita Road and Pacific Coast Highway. In a regrettable error, Galloway directed a driver to turn onto the highway and into Ewart's path, leading to a collision that left Ewart with serious injuries. A jury awarded her nearly $1.4 million in damages, but the California Court of Appeal was left to decide whether Galloway or the County must foot the bill. On July 9, 2019, the appellate court ruled that the County is not responsible for the gross negligence of Galloway because she was not an employee of the County at the time of the accident (*Ewart v. County of Los Angeles*, No. B286379 (Cal. Ct. App. July 9, 2019) (unpublished)).

On September 25, 2014, Ewart filed her original complaint against the driver and the County in California state court. She advanced claims of negligence (motor vehicle), negligence (gross) and dangerous condition of public property. Ewart alleged that the County performed traffic control for the race in a negligent manner by allowing a motorist to turn right across the dedicated bicycle lane just as Ewart entered the intersection. After extensive discovery, Ewart amended her complaint to add Galloway as a defendant in March 2016. Prior to trial, Ewart settled with the driver and dismissed her third cause of action for dangerous condition of public property. Her claims against Galloway and the County for gross negligence proceeded to trial.

At trial, the County argued that it could not be held vicariously liable for Galloway's alleged gross negligence because she was an unpaid volunteer, not an employee. The trial court disagreed and found that Galloway was employed by the County at the time of the accident for the purposes of vicarious liability. The jury determined that Galloway acted with gross negligence, and her gross negligence was a substantial factor in causing harm to Ewart. Accordingly, the jury returned a verdict in favor of Ewart and awarded her $1,398,000, while attributing fifteen percent of the fault to the driver. Judgment was entered against the defendants in the amount of $1,228,050. After denying the County's post-trial motions to overturn the verdict, the defendants appealed the verdict in November 2017.

The main issue before the California Court of Appeal was whether Galloway was an unpaid volunteer at the time of the accident (such that the County could not be held vicariously liable for her misconduct) or an employee pursuant to Labor Code section 3366 because she was assisting in the performance of law enforcement duties at the time of the accident. In concluding that Galloway was an employee, the trial court had relied on several factors. First, the court stated

that the County was responsible for and conducted all traffic control for the Malibu Triathlon. Second, it assigned, directed and dispatched volunteers, including Galloway; Galloway was a long-term volunteer for the County and the County had trained her in traffic control duties. Moreover, the trial court had pointed out that she attended a meeting before the Malibu Triathlon at the Los Angeles County Sheriff Department's Lost Hills Station, where the County gave her specific instructions regarding her traffic control duties during the race. Finally, the trial court noted that under California Labor Code section 3366, subdivision (a), any person "engaged in the performance of active law enforcement service as part of the posse comitatus or power of the county, and each person . . . engaged in assisting any peace officer in active law enforcement service at the request of such peace officer, is deemed to be an employee of the public entity . . . that he or she is serving or assisting in the enforcement of the law, and is entitled to receive compensation from the public entity in accordance with the provisions of this division." Because Galloway was assisting a peace officer in active law enforcement at the request of the peace officer, the trial court determined that she was employed by the County at the time of the accident, and that the County could be held vicariously liable for her gross negligence.

The California Court of Appeal disagreed and held that Galloway's gross negligence could not be imputed to the County under the Labor Code. It noted that section 3366 falls squarely within the workers' compensation and insurance division of the California Labor Code and "is limited in application to workers' compensation benefits." The appellate court stated that Labor Code section 3366 "only dictates that unpaid volunteers may be able to claim workers' compensation benefits if they are injured while engaged in active law enforcement. It does not expand the scope of vicarious liability to hold a governmental entity liable for one of its volunteers' actions." Accordingly, the appellate court found that Galloway was an unpaid volunteer at the time of the accident and her gross negligence could not be imputed to the County. It reversed the trial court's order denying the County's post-trial motion and remanded with directions to enter judgment in favor of the County (the appellate court also affirmed judgment against Galloway).

With the California Court of Appeal denying a petition for rehearing on July 24, 2019, it appears that the long race surrounding these unfortunate events has likely ended, absent review by the California Supreme Court.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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