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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. In this issue, we feature contributions from our associates: Ayisha C. McHugh, Ian P. Jong and Brian M. Fried. Your feedback, thoughts and comments on the content of any issue are encouraged and welcome.

A special note to all of our friends and families around the globe, stay healthy and safe during the ongoing COVID emergency.

Edited by **Robert E. Freeman**

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Referee's Tort Claims Stuffed by Appeals Court

As evidenced by the packed arenas, face-painted fans, pep bands and post-game shouts (or laments) on sports talk radio, college basketball fandom can be a serious game. Now, multiply that sentiment times ten when considering how rabid the local fans and alums in the "Big Blue Nation" are for University of Kentucky basketball. Similarly, but with perhaps less fanfare, the federal courts take the First Amendment seriously. Earlier this year, the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of tort claims against a radio station and its hosts for allegedly encouraging the actions of an anonymous group of fans who had begun an online and offline trolling campaign against a referee and his roofing business after he purportedly blew several calls during a contentious 75-73 Kentucky loss in the 2017 NCAA Men's Basketball Tournament "Elite Eight" game against rival University of North Carolina. (*Higgins v. Kentucky Sports Radio, LLC*, No. 19-5409 (6th Cir. Feb. 27, 2020)). Barring a rehearing, the buzzer appears to have sounded on this dispute, which has lasted far longer than the 40 minutes of a regulation college basketball game.

Some readers may recall that we previously wrote about this dispute in our September 2019 Edition of *Three Point Shot*. To briefly recount the facts in the record, following Big Blue's bitter 2017 NCAA Tournament knockout many Kentucky fans blamed the loss on the officiating of one of the game referees, plaintiff John Higgins ("Higgins" or "Plaintiff"). Soon after the loss, fans discovered that Higgins owned a roofing business, and began an online trolling campaign that led to negative reviews on the company's Facebook page, a slew of unwanted phone calls, and even physical threats that compelled the police to get involved. This fast break of vitriol could also be heard on Kentucky Sports Radio, LCC ("KSR"), where a radio show host, Matthew Jones and KSR website editor Drew Franklin (the "Hosts") added their own scathing commentary about the game and Higgins' "putrid" calls during post-game shows and in blog posts and articles published on KSR sites. While explicitly noting that they did not condone trolling behavior, the Hosts, at times, laughed about or gave "facetious approval" of the fans getting after Higgins and also reproduced screenshots of abusive social media posts from anonymous fans on the KSR blog as well as a link to an unhappy fan's video targeting Higgins' roofing business.

In 2017, Higgins filed claims against KSR and the Hosts for their alleged technical foul in reporting on the trolling campaign waged against Higgins. Higgins asserted claims for intentional infliction of emotional distress, invasion of privacy, and tortious interference with a business relationship, among others. Higgins claimed that the Hosts incited and sustained the trolling campaign, which substantially affected Higgins' roofing business. In March 2019, a Kentucky district court dismissed the suit, ruling that the 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)).

On appeal, the Sixth Circuit analyzed the x's and o's and held that the lower court correctly ruled that the First Amendment provided a strong defense and barred the liability theory underlying Higgins' claims. The court first addressed the meaning behind "matters of public interest," and whether speech involves a "public or private concern." Importantly, the court noted that sports coverage implicates public concerns because of the in-depth coverage published throughout the nation in daily newspapers and the existence of periodicals exclusively focused on sports. According to the court, the coverage of games includes criticism of team performances and commentary on the quality of the officiating:

> "Kentucky Sports Radio could fairly discuss the game—and could freely criticize those who participated in it, including the referees, the coaches, the players, the fans, and for that matter the commentators. […] Sure, some Kentucky fans likely tuned in to Kentucky Sports Radio's coverage of Higgins solely for the schadenfreude. But even if its discussion served only that purpose, the discussion's 'inappropriate or controversial character' would not influence our analysis as to 'whether it deals with a matter of public concern.'"

The Sixth Circuit also found that the Hosts' discussion of Higgins's business was only done in context with the fans' criticism and noted that Higgins had used his role as a referee to garner business in his roofing business by not so subtly naming his website "rooferees.com." The court went on to state that Higgins "cannot seek damages from pundits who called attention to the existence of a business that he promoted with his status as a referee before that became a liability."

The court also determined that the sequence of events was important in that the adverse fan reaction preceded KSR's coverage. Indeed, the court noted that a fan had posted a video identifying Higgins' roofing business before the KSR post-game show, and the "fan community anonymously coordinated retaliation online without the station's prodding."

Higgins also failed to take it to the rack when the appeals court rejected his arguments that the Hosts' commentary incited the fans to take unlawful measures and therefore fell outside the First Amendment. The court held that despite KSR's coverage that "did more to fan the flames of discontent than to extinguish them," Higgins failed to identify "any statement made by the defendants, explicitly or implicitly, that fans should attack his business." The Hosts could not have incited lawlessness because they did not "specifically advocate" for listeners to take unlawful action. The court reiterated that the commentary on the trolling campaign against Higgins took place only after fans retaliated and the reporting did not call for action.

Dismissing Higgins' claim of defamation was an alley-oop for the court, which found that Higgins is a public figure and the statements he objected to, specifically the criticism on his refereeing, related to matters of public concern. As a public figure, Higgins needed to show that KSR had acted with "actual malice – that it knowingly made false statements or acted with reckless disregard to the truth of its statements." The court did not find such malice: "Merely repeating potentially false reviews generated by other users may be in bad taste. But it cannot by itself constitute defamation."

The Sixth Circuit's dagger of a decision not only affirmed the lower court's ruling but importantly highlighted the reality of individuals who step "into the public limelight." While Higgins used his role as a referee to garner business, such a public role also made it much harder to call a foul. "A gulf lies between commenting on harassment and causing it," the court stated, ultimately concluding that a ruling in Higgins' favor would have decreased the efficacy of First Amendment protections for journalism and other types of criticism.

Golfer Tees Up Injury Suit after Cart Crash

A day on the golf course is usually associated with blue skies, lots of sun, and a light breeze to keep the heat at bay. Such days are not typically associated with the risk of major injury.

But unfortunately, that's exactly what happened to Thomas McKeown ("McKeown") when he was brutally injured on the course in a crash involving a golf cart in May 2015. McKeown and another golfer were playing in a foursome with Philip Capavanni ("Capavanni") and his then 82-year-old father-in-law Brian Robinson ("Robinson") at Beaver Brook Country Club, a golf course operated by American Golf Corporation ("AGC"). Capavanni was a highly experienced golfer, and Robinson, visiting from Scotland, was also a longtime player, but testimony suggested that he may have never driven a golf cart before (as they are not generally used in Scotland) and may not have even had a driver's license. At the ninth hole, Capavanni drove the cart he and Robinson were using to a spot approximately 100 yards from the green. Robinson then got behind the wheel of the cart and drove it closer to the green, where McKeown had parked his own cart. As McKeown was retrieving his putter from the back of his cart, Robinson crashed into McKeown, pinning him between Robinson's cart and his own and snapping his leg wide open. At the time of the accident, Robinson had allegedly told Capavanni that the crash was a result of a "rangefinder" (a small device that measures distance to the pin) that had become lodged under the brake pedal of the golf cart, preventing him from stopping.

Before going out on the course, Capavanni rented the cart from AGC. In signing his rental agreement, Capavanni agreed to "assume all risk" associated with the cart's use; he also acknowledged that he was "familiar with [its] operation and proper use" and promised he would not permit the cart to be operated by "anyone unfamiliar with the operation and proper use of the cart."

As a result of his injuries, McKeown brought suit against AGC, Capavanni, and Robinson in New Jersey Superior Court, Law Division, Morris County, claiming, among other things, that Capavanni negligently entrusted his leased cart's operation to Robinson. In January 2019, AGC and Capavanni obtained summary judgment, with the Superior Court finding that Capavanni's lease agreement for the golf cart spelled out a duty owed to the country club, and not to McKeown. The court also ruled that, even assuming Robinson was inexperienced with the operation of a golf cart, it was not "foreseeable that the rangefinder would become lodged under the pedals as a result of Robinson's inexperience…." McKeown appealed to the Superior Court of New Jersey, Appellate Division, arguing that the lower court erred in granting summary judgment on his claim that Capavanni negligently entrusted his leased cart's operation to Robinson. At this point, on the back nine of this litigation, Capavanni was the only party remaining on the score card, as AGC had resolved claims and Robinson, a Scottish resident, defaulted.

In reversing the lower court's decision, the New Jersey appellate court rejected two assumptions made by the lower court judge, and remanded the case (*McKeown v. American Golf Corp.*, No. A-3408-18T1 (N.J. Super. Ct., App. Div. Feb. 7, 2020)). First, the lower court had viewed the cart rental agreement as an adhesion contract which placed a duty upon Capavanni to operate the cart in a way to avoid loss or risk to AGC, not to McKeown. The appellate court rejected this assumption with one swing, stating that, with or without the lease agreement, Capavanni had a "common law obligation to refrain from entrusting a golf cart to an incompetent operator." Citing a case from the New Jersey Supreme Court involving the hiring of a known-to-be reckless crane operator, the court emphasized that "persons must use reasonable care in the employment of all instrumentalities – people as well as machinery – where members of the public may be expected to come into contact with such instrumentalities." Thus, the appellate court ruled that because Capavanni had a common law

duty not to allow the cart's use by an incompetent operator, the court need not consider the lower court's determination that the rental agreement was a contract of adhesion or that the agreement did not impose such a duty.

Secondly, the court rejected the lower court`s finding that Capavanni was entitled to summary judgment based on the assumption that it was not foreseeable that the rangefinder would become lodged under the brake pedal and that the same incident could have occurred with an experienced cart driver. The appellate court ruled that such assumptions are questions for the jury to make since they are fact-sensitive; and that the lower court mistakenly gave the defendants the benefit of reasonable inferences instead of the plaintiff. Ultimately, in reversing the lower court and remanding for trial, the appellate court found it was for a jury to decide whether it was foreseeable that the particular placement of the rangefinger could lead to its falling to the operator's feet where it could cause problems with the brake pedal, as well as whether Robinson's inexperience with golf carts was the proximate cause of McKeown's injury.

While injuries on the golf course are not commonplace, McKeown's unfortunate experience shows that unlikely events beyond a double eagle can happen on the links. A look at the court docket reveals that trial is currently scheduled for June 1, 2020, when we may see how the jury fills out its scorecard on this dispute.

Boxing Pay-Per-View Distributor Scores TKO over Bar Owner

The Court of Appeals for the Fifth Circuit recently gave a boxing pay-per-view ("PPV") provider a unanimous victory when it affirmed a Texas district court decision that found a local bar in violation of the Federal Communications Act ("FCA") when it aired a highly anticipated boxing match and charged patrons a cover charge without authorization to do so.

J&J Sports Productions, Inc. ("J&J" or "Plaintiff"), a California-based sports PPV distribution company, brought the case in 2017 against Enola Investments, L.L.C. (d/b/a Tea'ze Daiquiri Lounge, the "Lounge") and its owner Tiffaney Small (collectively, the "Defendants") after the Defendants aired a 2015 boxing match between Floyd Mayweather and Manny Pacquiao at the Lounge (*J&J Sports Productions, Inc. v. Enola Investments, L.L.C.*, No. 4:17-cv-02893 (S.D. Tex. filed Sept. 27, 2017)). J&J owned the right to sublicense broadcasts of the high-profile PPV title fight, which was billed as "The Fight of the Century" (the "Fight"), and claimed that the Defendants aired the Fight at the Lounge without paying J&J the requisite sublicensing fee. According to the court, the commercial licensing fee for the Lounge would have totaled $3,000.

By all accounts, J&J is a formidable opponent as it has entered the ring countless times over the years to fight off unauthorized airing of PPV broadcasts (see e.g., the Summer 2013 edition of *Three Point Shot*). J&J appears to have filed thousands of lawsuits against bar and restaurant owners that air its matches without proper authorization. J&J has honed its license enforcement into a "sweet science" and actively hires hundreds of private investigators to visit establishments on significant fight nights and record pertinent information including the number of televisions displaying the fight, guests in attendance, and the cover charge at the door. J&J then determines whether the establishment properly paid to broadcast the particular fight. If the venue did not pay, J&J demands the licensing fees and damages it is owed.

Depriving J&J of its sublicensing purse proved to be a poor tactic for the Defendants on this occasion. The Plaintiff began the battle on the offensive by asserting claims under 47 U.S.C. §§ 553 and 605 of the FCA. Section 553 "prohibits persons from intercepting or receiving any communications service offered over a cable system without authorization" (the "unauthorized interception" statute), while § 605 "bans the unauthorized publishing of the contents of communications received or transmitted by wire or radio, including satellite transmissions" (the "unauthorized publication" statute). Aggrieved parties may recover statutory damages and attorney's fees under §§ 553 and 605, plus additional damages if the violation is deemed "willful" and "for purposes of commercial advantage or private financial gain."

The Defendants refused to backpedal and initially asserted that an employee streamed the Fight over the internet, making § 553 inapplicable. J&J absorbed the blow and connected with a jab when one of its private investigators testified that the Fight's high-definition

quality exceeded what could be transmitted over an internet stream. The Plaintiff went for the knockout punch when its corporate representative confirmed that the Fight was not even available to commercial establishments via internet streaming. J&J took one on the chin, however, when its private investigator testified at trial that "he did not see cable or satellite equipment at the Lounge."

In light of the conflicting evidence regarding the method of interception, the Texas district court did not impose liability under § 553. Instead, it relied on § 605 and held the Defendants liable for exhibiting the Fight at the Lounge without J&J's authorization. The court awarded the Plaintiff $6,000 in statutory damages, $6,000 for a willful violation and $14,000 in attorney's fees ($26,000 in total). To calculate damages, the court relied exclusively on § 605, stressing that it did not factor § 553 into the calculation because of the conflicting evidence as to how the Defendants physically received the broadcast. In calculating damages, the court pointed to the Defendant's stipulation that it would require affirmative steps to receive the transmission and ultimately broadcast the Fight. Given that the transmission could not have been published without some form of interception taking place, and the fact that the Lounge charged a cover fee and reaped commercial advantage, the court deemed the violation willful. The Defendants swiftly counterpunched by appealing the decision to the Fifth Circuit following its district court defeat. (*J&J Sports Productions, Inc. v. Enola Investments, L.L.C.*, No. 19-20458 (5th Cir. Feb. 28, 2020)).

In the rematch, the Fifth Circuit made quick work of Defendants' appeal. Seeking to sow further doubt on appeal about whether the Fight was shown over cable, satellite or internet, the Defendants claimed that it had a business account with Comcast and showed the Fight via cable broadcast. The Fifth Circuit emphasized that the FCA does not require identification of the precise means used to accomplish the piracy of a satellite signal. Additionally, the Fifth Circuit held that the "only undisputed evidence [was] that the Fight was originally transmitted via satellite," so the district court judge had several plausible options between satellite, internet or cable, and "when there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." The court also dodged Defendants' argument that its violation was not willful, stating that: "A bar does not mistakenly intercept and broadcast a transmission when it needs decoding or descrambling equipment to do so." The appeals court therefore affirmed the lower court's judgment for $12,000 in damages and $14,000 in attorney's fees.

Thanks to yet another knockout victory, J&J's Fifth Circuit decision further cements its dominant litigation record and sends a clear message to potential challengers – stay out of the unauthorized distribution ring or face the consequences.

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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